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Part IV

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Economic Regulatory Administration

Powerplant and Industrial Fuel Use Criteria for Petition for Exemption From Prohibitions

DEPARTMENT OF ENERGY

Economic Regulatory Administration

[Docket No. ERA-R-78-19E]

10 CFR Parts 502, 503, 505, and 507

Powerplant and Industrial Fuel Use Act of 1978; Criteria for Petition for Exemption From Prohibitions of the Act

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Interim rule.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) is issuing this interim rule to implement provisions of the Powerplant and Industrial Fuel Use Act of 1978 (FUA) which prohibit the use of petroleum and natural gas by certain electric powerplants and major fuel burning installation. These rules establish the criteria upon which owners and operators of powerplants and installations may petition for exemption from the prohibitions of the Act.

DATES: These interim rules shall become effective on May 8, 1979. ERA has decided to extend the period for written comments until August 15, 1979, before issuing its final rules on Parts 502, 503, 505 and 507. No additional public hearings will be held. However, before finalizing these rules, ERA will consider all written comments submitted during this extended comment period.

ADDRESSES: All comments should be addressed to Public Hearing Management, Docket No. ERA-R-78-19E, Department of Energy, Room 2312, 2000 M Street, NW., Washington, D.C. 20461.

FOR FURTHER INFORMATION CONTACT:

William L. Webb (Office of Public Information), Economic Regulatory Administration, Department of Energy, 2000 M Street, NW., Room B-110, Washington, D.C. 20461, (202) 634-2170.

Stephen M. Stern (Regulations and Emergency Planning), Economic Regulatory Administration, Department of Energy, Room 2130C, 2000 M Street, NW., Washington, D.C. 20461, (202) 254-3987.

Robert L. Davies (Fuels Regulations—Program Office), Economic Regulatory Administration, Department of Energy, Room 6128I, 2000 M Street, NW., Washington, D.C. 20461, (202) 254-3910.

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SUPPLEMENTARY INFORMATION:

I. Background and extended comment period
II. Comments
III. Procedural matter

I. Background and Extended Comment Period

Parts 502, 503, and 505 of these interim rules set forth the criteria that must be met to establish eligibility for a temporary or permanent exemption under Title II of FUA. Part 507 defines "natural gas" and "petroleum" and establishes reporting requirements for certain fuels excluded from these definitions.

ERA published proposed rules for new and existing facilities on November 17, 1978 and January 29, 1979 (43 FR 53974 and 44 FR 5808, respectively). In the preambles to those proposed rules, ERA described the basic provisions of FUA and its proposed programs to implement them. ERA solicited comments on its proposals and held public hearings in Boston, Massachusetts on February 7, 1979; Salt Lake City, Utah on February 14, 1979; Tampa, Florida on February 21, 1979; and Lexington, Kentucky on March 2, and 3, 1979.

ERA received a large number of written comments and heard a variety of oral presentations at its hearings, all of which were incorporated into the record of the administrative proceedings on these rules. Based upon these comments and ERA analysis of the full record in these administrative proceedings to date, ERA has decided to issue this interim rule to establish the criteria for exemptions under FUA. ERA plans to publish interim rules for Parts 504 and 506 in the near future in order to provide the basis for full implementation of the regulatory programs required by FUA.

ERA has also decided to extend the period for submission of additional written comments on this interim rule. This extended period for additional written comments commences on the date this interim rule is issued and extends until August 15, 1979. ERA invites all interested persons to participate in these further proceedings by submitting any written information, views or arguments to Department of Energy, Public Hearing Management, Room 2313, 2000 M Street, N.W., Washington, D.C. 20461. All submissions should be identified on the outside envelope and on the documents contained therein with the designation, "New Facility Regulations," Docket Number ERA-R-78-19E. You should submit 15 copies. All comments received will be available for public inspection in the DOE Reading Room GS-152, James Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. We will consider all comments received by August 15, 1979, and incorporate these into the record of the administrative proceedings on Parts 502, 503, 505, and 507.

ERA will receive petitions for exemptions and make determinations in accordance with the procedures and definitions set forth in Section 500.2 and Part 501, issued concurrently with this rule. ERA's determinations on exemption petitions shall be made upon the basis of the standards and criteria set forth in Parts 502, 503, 505, and 507 of this Interim Rule, or upon the provisions of those Parts as subsequently revised where the application of a modification of a particular rule would result in a more favorable disposition of a particular petition. ERA urges you to file your petitions expeditiously so that ERA may render a timely decision on each petition.

ERA also conducted FUA-related rulemaking proceedings on transitional facilities, uses of natural gas, outdoor decorative lighting, and restrictions on the increased use of petroleum. On March 21, 1979, ERA published its Revised Interim Rule to Permit Classification of Certain Powerplants and Installations as Existing Facilities, 44 FR 17464, which established the criteria and procedures whereby ERA would make determinations as to whether a facility is subject to the provisions of Title II of FUA governing new facilities, or the provisions of Title III which governs existing facilities. On April 9, 1979, ERA published a final rule establishing an Exemption for Use of Natural Gas by Existing Powerplants Under the Powerplant and Industrial Fuel Use Act of 1978, 44 FR 1979, which established criteria and expedited procedures by which owners and operators of existing powerplants may petition for a temporary public interest exemption from the prohibitions against use of natural gas contained in Section 301(a) (2) and (3) of FUA. On May 7, 1979, ERA issued its final rule establishing prohibitions on The Sale and Direct Industrial Use of Natural Gas for Outdoor Lighting, pursuant to Section 402 of FUA; and concurrently with this rule, ERA is issuing its Interim Rule establishing a Prohibition Against the Increased Use of Petroleum by Existing Electric Powerplants pursuant to Section 405 of FUA.

II. Comments

In the Preamble to the Proposed Rules published on November 17, 1978 and January 29, 1979, ERA specifically solicited comments on such issues as: the various exemptions, the Fuels Decision Report, the cost calculations, the substantially exceeds index, general requirements and terms and conditions for exemptions, competition, urban policy and the Fuel Classification and Reporting Requirements.

ERA received a number of written and oral comments on these issues as well as comments on many issues not specifically identified in the Preamble to the proposed rules. In order to facilitate an orderly discussion of these comments and ERA's specific responses to them, each will be discussed in the order that they appear in this interim rule.

Fuels Decision Report (Part 502)

Many comments were received criticizing the requirements imposed by the Fuels Decision Report as excessive, burdensome, unreasonable, confusing and costly. There were many specific comments which reflected the confusion experienced by the commentors concerning the kinds and quantities of information required for each chapter of the Fuels Decision Report. In addition, many commentors made the point that, for certain exemptions at least, the fuel search provisions of the Fuels Decision Report were inappropriate and, indeed, not required by law.

In response to all of these comments, ERA has significantly restructured the Fuels Decision Report. The Report is no longer organized in a technical, analytical format, e.g., engineering considerations, economic considerations, etc. It is now organized to reflect the eligibility and evidentiary requirements stipulated in the exemption regulations and the information needed by ERA to complete the exemption process. Its size and burden are totally dependent upon the exemption requested. The chapters no longer contain specific directions telling a petitioner specifically how he must make the required showings.

Submission of a Fuels Decision Report is not needed for those exemptions which by the Act or regulations primarily involve certifications rather than demonstrations of eligibility. These exemptions are: the peakload exemption for new powerplants; the emergency exemption; and the retirement exemption for existing units. Although petitioners for these exemptions do not have to submit a Fuels Decision Report, they do have to comply with the evidentiary requirements of the appropriate regulations and make the required showings in their petitions.

Most exemptions no longer require a fuel search and therefore do not require a broad-based Fuels Decision Report containing multiple exemption requests. Instead, the interim regulations require only that the Fuels Decision Report contain evidence that demonstrates eligibility for the exemption, compliance with appropriate general requirements, and information needed by ERA to develop terms and conditions if the exemption is granted and to comply with National Environmental Policy Act (NEPA) requirements.

The alternate fuel search is now required only for the following permanent exemptions: lack of alternate fuel for the first 10 years of useful life; lack of alternate fuel at a cost which does not substantially exceed the cost of using imported oil; site limitations; environmental requirements; lack of adequate capital; State or local requirements; intermediate load; and scheduled equipment outages of over 21 days.

The first five exemptions listed require, by law, a demonstration that, despite a good faith effort, legal, economic or technical constraints preclude use of an alternate fuel. The latter three exemptions are discretionary rather than mandatory, and given the nature of the exemptions, a fuel search is consistent with and furthers the purposes of the Act. The latter two, moreover, by law, contain an alternative site requirement which must be met for new powerplants. ERA believes that the presence of an alternative site requirement supports the requirement of a showing that the use of alternate fuels is, in fact, not feasible.

ERA estimates that these changes will reduce the total reporting burden on utilities and industry due to the Fuels Decision Report by well over half in the aggregate. The burden and cost experienced by a particular company will depend on the numbers and kinds of exemptions requested by that company. A request for a peakload or temporary exemption will result in a minimal burden for a petitioner. A request for a permanent cost exemption for a new powerplant necessitates much more information due to the legislative mandate that the general requirements—alternate supply of power, mixtures, and (when applicable) fluidized bed—be met, as well a fuel search undertaken, alternative sites examined and, ultimately, multiple exemptions requested. However, even in this case, the burden has been pared down to the level contained in the legislation.

Some comments questioned the legal authority of ERA to require submission of a Fuels Decision Report. ERA may, under Section 701(c) of FUA, stipulate the form and format of requests for exemption. In addition, ERA has significant information-gathering authority under Section 711(a) of the FUA and Sections 5 and 13(b) of the Federal Energy Administration Act of 1974 (FEA Act). The FUA provisions themselves provide ample legal basis for the requirement that information to be used in establishing terms and conditions include oil and gas consumption and conservation measures, and that environmental information be provided for use by ERA in complying with NEPA requirements.

ERA received a number of comments suggesting that ERA should stipulate the alternate fuels which must be considered by a petitioner in his Fuels Decision Report. Some commentors merely stated that ERA should define the fuels which should be examined; others stipulated what the fuels are that ERA should require to be examined, with coal, petroleum coke, coal derivatives and coal oil mixtures being those fuels mentioned most frequently. The point was made by several commentors that ERA should limit consideration of alternate fuels to those fuels which are commercially available, technically practical, in general use with industrial acceptance, economic, available in sufficient quantity to satisfy the petitioner's requirements, and must take into account other specific parameters to which a facility is subject. ERA recognizes the potential merit of such proposals, although we are not yet in a position to implement them.

The range of these comments reinforces ERA's decision to allow the petitioner to select those alternate fuels which are reasonable for his needs and supply opportunities in those cases where a fuel search is required. It is up to the petitioner to describe his particular situation and to examine those fuels which best meet his needs. Those fuels are likely to differ significantly among petitioners. Although it may be that all petitioners should examine the use of coal, land-fill methane may not be a reasonable option for a petitioner located at a significant distance from a dump or a land fill. Solar may be a more reasonable alternative for a petitioner located in the sunbelt than for one located in some other area. The use of wood chips, black liquor, or wood waste is often a reasonable option for paper mills and

lumber mills, but may not be for a steel mill.

ERA has made provision for pre-petition conferences to scope out the number and kinds of alternate fuels which must be examined by a petitioner when a fuel search is required. This stage of the process is particularly important since ERA intends to undertake a serious review of the petitioner's choice of alternate fuels. ERA does retain the right to request more information, not accept a petition, or deny an exemption on the grounds that a petitioner for one of the exemptions requiring a fuel search failed to demonstrate adequately that he could not use a particular alternate fuel.

ERA does recognize the problems faced by petitioners in attempting to determine what fuels to examine when ERA has provided no guidance. ERA is considering developing and proposing regulations which provide a process to address this question. These regulations could provide a mechanism by which ERA, in concert with DOE's Offices of Energy Technology and Resource Applications would solicit public comment and information from industry on the feasibility and commercial acceptability of alternate fuels and innovative technologies. This process would result in publication by ERA of a presumptive matrix of alternate fuels and technologies which could be amended on an annual or as-needed basis. It is expected that the matrix would identify various alternate fuels and identify their feasibility on such bases as industry, geographic location, unit size, unit type, and other criteria. That proposed regulation will also explain the procedure ERA will use to update the matrix.

Once such a matrix is established and published, ERA would expect petitioners who must conduct a fuel search to examine, at a minimum, those alternate fuels which are included in that part of the matrix which applies to them. ERA also would reserve the right to amend the fuels list contained in the matrix at the pre-petition conference. We solicit comments on the types of proceedings we should establish to initiate this process, on the kinds of criteria which should be used, on the level of specificity and detail that the matrix should include, and on the benefits or problems associated with the matrix concept.

A substantial number of comments was received criticizing the certification requirements proposed in the November 17, 1978, Federal Register notice. Few comments were received supporting the provisions. Essentially, § 502.2(e) required that the Chief Executive Officer certify as to the accuracy and professional integrity of the Fuels Decision Report and that the petitioner append to the certification a description of how the national policies concerning the use of alternate fuels were explained to corporate personnel, a description of the process by which a petitioner has in the past made his fuels decisions, and a description of the process by which the petitioner made the decision to seek an exemption. The certification provisions as a whole were criticized as being excessive and unnecessary, an intrusion into the management of private corporations, an attempt to dictate company management and the way corporate decisions are made, irrelevant to the regulatory proceedings, and an attempt to discourage exemption petitions.

In view of the comments, ERA has changed the regulations substantially. The requirement that the Chief Executive Officer (or any corporate official) certify to the accuracy of the Report has been removed. Moreover, only the duly authorized representative of the petitioner is required to sign any certification, not the Chief Executive Officer. The requirement that the certification include a description of how national fuel policies were explained to staff and the description of the company's historic fuels decision process has been deleted. The language requiring a description of the process by which a decision to request an exemption was reached has been modified substantially.

ERA received comments criticizing the requirement that professionals who prepare the Fuels Decision Report be required to certify. It was contended that this requirement was excessive and superfluous since these professionals could be required to testify under oath. ERA has modified the requirement. Instead of requiring that each professional certify, the regulation merely requires that the petitioner certify that significant contributors to the Report have been informed that they may be subject to questioning under oath in a public hearing. Principal contributors to the Report must by listed and their disciplines identified.

Several commentors suggested that the information required in the Introduction pertaining to utility supply and demand forecasts was duplicative of information required by other regulatory bodies. ERA concurs and has deleted the requirement.

Several commentors suggested that the waiver provision in the pre-petition conference be expanded and made more specific. ERA does not believe that increased specificity would be useful. Any waiver is a discretionary action on ERA's part which will turn heavily upon the particular situation at hand. ERA believes that by restructuring the Fuels Decision Report, the need for most waivers has been eliminated. ERA expects the pre-petition conferences to focus on the fuels to be examined if a fuel search is required and on other matters as to which it can be concluded, even at the pre-petition conference stage, that substantial effort or analysis by the applicant would not be warranted. Efforts to obtain State Implementation Plan revisions, for example, may in some circumstances be predictably fruitless. As experience is obtained, it may further be possible to specify the provisions bearing upon pre-petition conferences. ERA will carefully consider proposals to do so.

Some commentors suggested that ERA prepare and publish a sample Fuels Decision Report. Since each Report will be unique to a case, ERA believes that publication of a sample Report would confuse rather than clarify the requirement. Once petitions for exemption are accepted, summaries will be published in the Federal Register and the petition, including the Fuels Decision Report, will be made available to the public. The precedents will provide the best guidance on what ERA will consider acceptable.

Several commentors criticized the requirement that the appendices include any studies and memoranda relating to fuel choice decisions prepared during the past 5 years as unreasonable and irrelevant to the exemption decision. ERA concurs and has deleted that language. However, ERA does strongly recommend that a petitioner append any documentation which supports his exemption request and which will assist the decision process.

Several commentors suggested that the Fuels Decision Report should be prepared on a site or company basis rather than a unit-by-unit basis. Yet, the FUA, with the exception of the System Compliance Option, clearly provides for prohibitions and exemptions on a unit-by-unit basis. As a result, exemptions must be requested on a unit basis and therefore these interim rules contemplate Fuels Decision Reports prepared on a unit basis. If, however, a petitioner is requesting exemptions for two or more units which operate in combination at the same site, a petitioner may submit only one Fuels Decision Report as long as the exemptions requested and the units to which they pertain are clearly

distinguished in the Report. Moreover, ERA recognizes that it may be advantageous for both companies and ERA to consider long range, comprehensive fuels decision planning. ERA therefore encourages the preparation and submission in close conjunction with each other of interrelated exemption requests. It will probably also be possible to incorporate by reference in subsequent Fuels Decision Reports portions of an initial Report that involved a unit at the same site as the units contemplated in the subsequent Reports. ERA is prepared to explore the potential for all such techniques in pre-petition conferences.

Several commentors stated that the information requested in the Petroleum and Natural Gas Consumption chapter of the Fuels Decision Report is not relevant to decisions on exemptions. ERA has clarified in the regulations that the purpose of such information is not to determine eligibility for exemptions but to serve other purposes of the Act.

Some commentors objected to the magnitude of the requirement that utilities must provide supply and consumption data for its electrical region in the Petroleum and Natural Gas Consumption chapter of the Report. ERA agrees and has deleted that requirement.

Some companies stated that the requirement in the Petroleum and Natural Gas Consumption chapter for fuel use projections up to 1990 is unrealistic since many companies employ only a 5-year planning program or less. ERA believes that a planning horizon of 10 years—to about 1990—is not unreasonable within the context of the Act. Several temporary exemptions are allowed for 10 years, including extensions. The focus of the Act is on the long-term turnover of the nation's stock of powerplants and installations. The statutory prohibitions against the use of natural gas by existing powerplants take effect in 1990. In sum, the Act essentially requires a 10-year planning horizon and this chapter adheres to that policy.

Several commentors stated that the information requested in the Conservation chapter is irrelevant to the exemption decision process. The purpose of the chapter is to provide ERA with information that can be used in formulating terms and conditions which may be imposed if an exemption is granted. Other commentors challenged the scope of the chapter, stated that an excessive amount of information was requested, and stated further that the chapter contravened the National Energy Conservation Policy Act (NECPA). ERA disagrees. The chapter requires that the petitioner describe what conservation measures he has taken and intends to take for the unit and the site. It also requests the petitioner to describe his conservation goals. Such a requirement represents adherence to the purposes of both the FUA and the NECPA. FUA authorizes ERA to limit oil and gas use if reasonable conservation conditions are not satisfied. ERA will exercise such authority both in setting terms and conditions and in determining whether a powerplant applicant for certain exemptions has shown, pursuant to the regulations issued under Section 213(c) of the Act, that there is no alternative supply of power available. Such conditions under FUA do not require conservation in general; rather, they are preconditions to the use of oil or gas under a statute designed to conserve those fuels.

Some confusion was evidenced by commentors concerning the Environmental Impacts Analysis chapter. The purpose of the chapter is to assist ERA in complying with the NEPA. The FUA states that only temporary exemptions and certain permanent exemptions for existing facilities are exempt from compliance with NEPA. All other exemptions are subject to NEPA requirements. Compliance with NEPA does not necessarily mean that an environmental impact statement is required before an exemption may be granted or denied. It does mean, however, that sufficient environmental information is required to determine whether a finding of no significant impact, an environmental analysis (EA), or an environmental impact statement (EIS) is required before an exemption is granted or denied. ERA expects that the amount of environmental analysis required to be included in a Fuels Decision Report will vary on a case-by-case basis and will be a topic of discussion at pre-petition conferences.

ERA will use data supplied in this chapter to determine not only what level of environmental analysis is needed prior to granting or denying an exemption but also as a base in order to expedite preparation of EA's and EIS's, where needed.

ERA does not intend that this chapter be duplicative of other information supplied by the applicant and has suggested that such information be incorporated by reference. In addition, in our proposed guidelines for Environmental Reports published in the Federal Register on January 31, 1979 (44 FR 6177) we requested information on present or future EIS's by other agencies which would adequately reflect impacts under FUA.

The kinds of information required in the Environmental Impacts Analysis chapter reflects the requirements of the proposed guidelines. The comments received on those guidelines have not yet been reviewed, nor have the proposed guidelines yet been revised. As a result, the kinds of information required in the Environmental Impacts Analysis chapter may be revised in the future to reflect ERA's response to comments on the proposed guidelines and associated issues.

Substantially Exceeds Index (§§ 503.5 and 505.5)

In the regulation originally proposed by ERA governing the cost calculations required of a petitioner for an exemption under Sections 211(a), 212(a), 311(a) and 312(a) of the Act, ERA proposed a range of 1.3 to 1.8 times the cost of using imported petroleum. ERA has received numerous comments on this proposed range which suggest that it (including the example used by ERA of 1.5) may be excessive and not in accordance with the statutory standard of what is appropriate for an index reflecting a cost which does not "substantially exceed" the cost of using imported petroleum.

The comments state that a study done by the Department's Energy Information Administration (EIA) indicates any ratio above 1.1 to 1 will generate little or no incremental benefit to the nation.[1] The commentors also contend that the index is inflexible in nature and violates current Federal price policy with respect to announced wage and price guidelines. Some comments stated that other Federal agencies and the courts have stated that an increase in costs of 5 to 10 percent is substantial in cases involving other Federal statutes and regulations.

Statutory Purposes

With regard to the actions of other agencies under other statutes, ERA believes that the substantially exceeds cost test index must be set at a level that will carry out the purposes of this Act without imposing costs on the American public as a result of using coal or another alternate fuel that greatly exceed the benefits obtained under the Act. In this regard, it is important to look at the purposes of the Act as set forth by the Congress in Section 102.

[1] "Analysis of Proposed DOE Regulations Implementing the Powerplant and Industrial Fuel Use Act" AM/EI/79-07. This memorandum can be obtained from: Energy Information Administration Clearinghouse, 1762 M Street, N.W., Room 210, Washington, D.C. 20461, (202) 634-5641.

These purposes include a reduction in the importation of petroleum and an increase in the nation's capability to use indigenous alternate energy resources to move toward a goal of national energy self-sufficiency. Other purposes include the conservation of natural gas and petroleum for uses other than electric or other industrial or commercial generation, the encouragement of the use of coal and other alternate fuels as primary energy sources, the conservation of our nation's supplies of natural gas and petroleum for the benefit of present and future generations and a reduction in the vulnerability of the United States to energy supply interruptions. It is incumbent upon ERA to set an appropriate substantially exceeds cost index in light of these purposes in this statute.

With regard to comments that the Department's own analysis clearly indicates that a ratio greater than 1.1 to 1 would be of little benefit to the nation in reducing oil and natural gas use, it must be pointed out that this study examined only the cost of using coal versus the cost of using imported petroleum; it did not address, nor claim to address, the economic and national security benefits to the Nation obtained through the implementation of FUA. Within this scope, while the EIA analysis did show that little or no oil and gas savings were forthcoming from the utility sector at index levels higher than 1.1, it also showed that significant savings were obtained from the industrial sector at much higher index values.

Other commentors stated that whether a powerplant or installation is able to meet the cost test should not be the sole criterion and that a facility should still receive an exemption to use oil or natural gas if (a) in the case of an MFBI, the cost to build such facility makes it unable competitively to produce its product at its present or projected site or, (b) in the case of a powerplant, the cost of such facility causes an "unreasonable" increase in the utilities rate base, thereby "substantially increasing" utility rates to consumer.

The test mandated by the Fuel Use Act is whether the cost of using an alternate fuel substantially exceeds the cost of using imported oil. The statute defines cost to include capital, operating and maintenance, and delivered fuel expenses discounted to the present. The test employed by ERA in Sections 503.5 and 505.5 of these regulations is a ratio of these cost elements discounted to the present. We do not believe that effects on competition can appropriately be substituted for the cost elements mandated by the statute, nor do we believe that an examination of such impacts could appropriately be used, or would of itself generate a proper measure under the Act of when the excess of costs is "substantial." As experience is gained under the Act, we will be better able to assess the pattern of impacts on utility rates of the cost index. We are not prepared presently to adopt a separate index designed for special categories of utilities.

Other commentors have pointed out that the analysis done by the Regulatory Analysis Review Group (RARG) in assessing the cost of compliance with the Act, also supports a lower index than the range of 1.3 to 1.8 in the proposed rules.[2]

ERA believes that the basic approach utilized in the RARG study was illuminating. We do not believe, however, that the study adequately accounted for the benefits of increased coal use in all respects, nor did it fully address the issue of future differences in the prices of oil and coal. ERA had fully reviewed the RARG study and finds the analysis conducted by DOE and described below to be generally consistent with RARG analysis with several significant exceptions.

Gas/Oil Displacement Ratio [3]

A particularly important difference is that the RARG analysis assumed that displacing a combination of natural gas and oil through implementation of FUA would result in a .69 to 1 displacement of imported oil—a major beneficial effect of the program. That is, RARG assumed that displacing of 100 BTU's of natural gas under the Act reduces oil imports by only 69 BTU's. The actual displacement ratio is extremely difficult to estimate with confidence. While we realize that from a purely analytic perspective the oil import displacement ratio for natural gas in particular may be less than 1 to 1, we believe it would be inappropriate to use a smaller displacement ratio in arriving at the "substantially exceeds" index under FUA for the following reasons.

A displacement ratio substantially lower than 1 to 1 is highly dependent on ample gas supplies over the 30 to 40 year planning period for this program. Where supplies are ample, displaced gas will remain in the ground rather than displace imported oil. We do not believe that it is appropriate to assume ample gas supplies when making policy judgments under FUA, an Act premised on a strong need to preserve natural gas because supplies are not ample.

Moreover, the Act and the legislative history give no indication that the Congress intended to value reductions in gas consumption less than direct reductions in oil use. Indeed, the Act is more restrictive of natural gas use than it is of petroleum use. We believe that a lower substantially exceeds index for natural gas than for oil would be inappropriate as a matter of policy and questionable as a matter of law under FUA. If there is to be a single index for both oil and gas, it would be highly inconsistent to determine that index using a critical assumption (the displacement ratio) that values gas less than oil.

Thus, while DOE recognizes and will continue to analyze this issue we do not at present find any basis for either setting a separate index applicable to the proposed use of natural gas, or lowering the index overall to account for a less than 1 to 1 displacement ratio. To do so, in ERA's view, would probably not be in accordance with the Act and would be an inappropriate valuation of this vital energy resource.

Primary Factors for Consideration

ERA believes it is essential in setting the index to take into consideration six primary factors: (1) The effect of an increased use of coal [4] in reducing the world price of oil and the consumption by the United States of imported oil; (2) the effect of an increased use of coal on United States balance of payments and the domestic rate of inflation; (3) the effect of an increased use of coal on our national security; (4) the impact of projected future increases in the price of imported petroleum relative to projected future increases in the price of domestic coal; (5) the impact of the implementation of the Act on accelerating the use and development of alternate fuels and alternate fuel technologies, and (6) the effect of an increase in the use of coal (in compliance with applicable

[2] RARG is a permanent regulatory review group composed of representatives of several agencies located within the Executive Office of the President. It was established to monitor the performance of regulatory agencies under the provisions of Executive Order No. 12044, "Improving Government Regulations."

[3] Note.—The paragraph under this subheading has been replaced by an amendment to this preamble published elsewhere in this Part. (See FR Doc. 79-15036)

[4] ERA expects the Act to accelerate the use of other alternate fuels besides coal. At this time we cannot quantify these benefits, but increased use of alternate fuels would clearly reduce oil imports, in particular displacing oil where direct burning of coal is environmentally limited. These reductions in oil imports would have an effect on reducing world oil prices and national security. Since we cannot quantify these impacts at this time, the benefits analysis, above, understates the true benefits of the Act.

environmental requirements) on the nation's air quality.

Oil Import Reduction Premium

ERA believes that one of the essential ingredients of the Act is the reduction in petroleum imports through an increase in the use of indigenous coal and other alternate fuels. Therefore, a primary component of the substantially exceeds cost index ratio should be the premium attributed to a reduction in oil imported as a consequence of an increase in the use of these domestic energy resources. A significant benefit resulting from such a reduction in the U.S. demand for imported oil is the anticipated reduction in world oil prices, or what is more likely, the reduction in the rate of increase in world oil prices. Any reduction in the world oil price path will benefit the U.S. (and other consuming nations as well) in that all crude oil may be obtained at lower prices. Thus, the economic costs that are saved by importing less oil are measured not solely by the price per barrel at which the saved imports would have been imported, but as well by the resultant reduction in the price of the barrels that are imported. [5]

ERA has relied upon various models in determining the premium attributed to the effect of oil import reductions resulting from the implementation of FUA on the world oil price. These models, which are in the record of this rulemaking included: (1) the Oil Market Simulation Model developed by the Energy Information Administration of DOE documentation in Appendix B of EIA Analysis Memorandum AM 11IA–7805); (2) the World Oil Market Model developed by the Office of Policy Analysis in DOE (documentation available from the Office of Policy and Evaluation upon request); and (3) Profit Maximization World Oil Model developed for the Office of Policy Analysis by ICF, Inc. (documentation available from the Office of Policy and Evaluation upon request). Various estimates of the effect of import reductions on the world oil price, and hence the benefit per barrel of these reductions, were derived using all of these models. These benefit estimates were found to be sensitive to the wide range of assumptions regarding OPEC pricing behaviors in the face of reduced demand which are contained in each model and ranged from $.73 to $4.55 (1978 dollars). ERA has calculated a premium of $2.25 as the appropriate estimate of the benefit per barrel of reduced oil demand. The $2.25 estimate was selected after a careful examination of the assumptions underlying each of the models, especially those regarding the basic objectives of OPEC pricing decisions. The Profit Maximization Model, for example, assumes the central objective underlying these pricing and production decisions is "wealth maximization", which results in a premium for reducing oil imports which is substantially smaller than $2.25. Conversely, the World Oil Market Model utilizes systems dynamics techniques and yields estimates which are much closer to the $2.25 premium chosen and are sensitive to the level of OPEC production. The estimates of the import premium fall to the extent it is assumed that OPEC chooses gradually to expand production. The Oil Market Simulation Model yields the highest estimates up to $4.55 of the import reduction premium in cases assuming high future demand for oil.

However, these estimates are sensitive to the rate of growth in demand by the consuming countries, including the U.S. In cases of low or moderate demand for oil, the OMS model estimates no effect on the world oil price until after 1985.

ERA chose the $2.25 premium after reviewing these models, the importance of key variables in determining the estimate, and the general validity of the basic assumptions underlying each modeling approach. ERA's decision rested on the following conclusions: (1) the basic objective in attempting to estimate the effect of FUA import reductions on the world oil price is important in the context of this rulemaking; (2) each of the basic assumptions underlying these estimates was sufficiently valid to deserve consideration; and (3) no single set of assumptions was found to be superior in all respects to the competing approaches.

The $2.25 value is based on the view that no single source of estimates should be disproportionately relied on for the purposes of determining this component of the import reduction premium. Accordingly, ERA assigned equal weight to the results of each of the three models. ERA believes this to be a reasonable approach in light of the divergence in the estimates, the projected pricing behavior of the OPEC cartel, and the level of demand by the oil consuming nations. Selecting a substantially higher or lower figure would have placed undue reliance on only one of several legitimate projections of the future behavior on the part of both producing and consuming nations. [6]

National Security Benefits

ERA also utilized an estimate of the benefit to the U.S. from the increased national security resulting from oil import reductions under the program. The RARG analysis did not include an estimate of national security benefits. We believe such an estimate to be essential, given that one of the primary purposes of the Act is to reduce the vulnerability of the U.S. to energy supply interruptions in the interests of national security. It must be kept in mind, in this regard, that since the oil emergency of 1973 there have been disclocations in the supply of imported oil, as recently evidenced by the current substantial interruption due to the Iranian situation.

While there are several possible methods of assessing the premium to be attributed to this factor, ERA believes that the most workable measure we have at the present time by which to assess the cost of achieving this goal is the cost of establishing and maintaining the Strategic Petroleum Reserve. [7] The Reserve is one of our prime strategic defenses against a supply interruption in imported oil. ERA has evaluated the cost figures applicable to the strategic petroleum reserve as part of setting an appropriate substantially exceeds cost ratio. This calculation results in a premium of $.40 per barrel reduction in oil demand attributable to this factor. This amount reflects the savings attributable to the potential reduction in the required size of U.S. strategic petroleum reserve resulting from the oil import reductions under the Act.

Balance of Payments Benefits

ERA also included in its analysis of the benefits of import reductions under the Act an estimate of the beneficial effect on the U.S. balance of payments, the strength of the dollar on international currency markets, and the rate of inflation in the U.S. To the extent that we reduce our reliance upon imported oil, we alleviate the U.S. balance of payments problem and strengthen the value of the dollar. This reduces the price of U.S. imports purchased with dollars and has a

[5] For a particularly useful recent presentation of this point, see Thomas C. Schelling, *Thinking Through the Energy Problem*, 29–30 (Committee for Economic Development 1979).

[6] Cf. Schelling, at 29: "There is no reliable way to calculate the effect of changes in world import demand on the price that will be set or obtained by OPEC countries. It is almost certain, however, that reduced demand for imports will soften prices or slow their climb, while increased demand would hold prices up or accelerate their climb . . ."

[7] The Strategic Petroleum Reserve was established pursuant to Section 151 et seq. of the Energy Policy and Conservation Act of 1975.

corresponding downward pressure on the U.S. inflation rate.

These estimates rely upon calculations done by the Council of Economic Advisors showing the costs of using monetary and fiscal policy to produce a similar reduction in the rate of inflation and include the offsetting effects on U.S. exports of an increase in the purchasing power of the dollar abroad. ERA has used a premium of $.30 per barrel reduction in oil imports applicable to this factor, after reviewing the RARG report which addressed this benefit and consulting with the staff of the Council of Economic Advisors on the assumptions and issues raised by this aspect of the analysis.

Legal Emissions Under the Clean Air Act

The RARG analysis argued that ERA should account for the cost of the additional legal emissions resulting from the increased use of coal in place of oil and natural gas. We agree with this view and have reduced the benefits per barrel premium by $.93 per barrel reduction in oil demand to account for additional costs to the Nation of using coal fuels in place of oil or natural gas.

The RARG study suggested that a figure of $.20 per million BTU's or $1.24 per barrel should be used. ERA reduced this number to $.15 per million BTU's or $.93 per barrel because, in ERA's view, the RARG estimate failed to account for a number of important factors. First, the costs of using available clean air increments for newer productive facilities when fired with coal rather than oil or gas will not occur immediately. Hence these costs should be discounted over time in order to arrive at their present value. This discounting-to-present-value-approach parallels the calculation of benefits estimates used both by RARG and by ERA.

Second, the compliance cost figures used in the RARG report to calculate the costs of incremental legal emissions did not account for the full range of means whereby emissions in a particular airshed might be reduced in response to these incremental emissions. Normal plant closures, offsets purchases and production process changes may in various instances provide means for reducing emissions at lower costs than those cited in the RARG report. The RARG analysis did not discuss these offsetting considerations. Thus, ERA concluded that $.93 represented a more appropriate estimate of these costs.

It should be noted that in computing whether or not a facility meets the test of the substantially exceeds cost index, the cost of environmental compliance for each fuel considered is taken fully into account. Thus, the difference in compliance costs is accounted for in making the cost test comparison; the $.93 represents the social cost of legal emissions.

Enhancement of Alternate Fuels Technologies

ERA believes that one of the primary benefits in implementing the Act is the acceleration in the use of alternate fuels and alternate fuel technologies accomplished through the application of the cost premium on the petroleum or natural gas use. While we have been unable to quantify this benefit, we believe it is an important consideration in assessing the validity of the substantially exceeds index.

Petroleum and Coal Price Trajectories

ERA also believes that the cost index should account for anticipated increases in oil prices relative to coal prices. (RARG assumed a constant relationship of oil and coal prices.) For ease of administration, ERA has determined that petitioners for exemptions under the Act should assume in the calculations under the cost test that current fuel prices will remain constant in real terms. ERA has added a separate factor of about three dollars to the cost index which raises it by an amount just sufficient to offset the use of an unrealistic constant oil-coal price gap in the cost test. This factor was based on the projected rate of increase in the difference between oil and coal prices. Based on past projections of the path of world oil prices which have proven to be too low when compared to actual world price changes, we believe a 2–3 percent increase to be reasonable for the purposes of accounting for the anticipated increase in oil prices relative to those of coal.

We realize that there are many models which are being developed to project the rate of increase in both coal and world oil prices and the effect of such increase on the rate of industrial and utility conversions to coal. However, such models can only take into account a limited number of factors which cannot be predicted with precision and assume that industry and utilities will in fact make investment decisions based on such assumptions.

ERA proposed a range of 1.3–1.8 in its proposed regulations. For the purposes of these revised interim regulations, ERA has selected the low end of that range and will employ 1.3 for purposes of evaluation of petitions for exemption submitted after the effective date of FUA. ERA has arrived at 1.3 after careful and detailed consideration of all relevant public comments, both oral and written, consideration of various analyses performed by the Office of Policy and Analysis and the Energy Information Administration, as well as the Regulatory Analysis Review Group, and after consideration from a policy perspective of the proper scope of the statutory term "substantially exceeds" when set in the context of the comprehensive purpose clauses of FUA contained in Section 102. ERA invites additional written public comment in regard to the 1.3 index and these pertinent considerations.

During the pendency of the additional public comment period which ERA is providing in regard to these interim rules, we will continue to review all additional public comments as well as the continuing analyses of these issues which will be ongoing by the Office of Policy and Analysis, the Energy Information Administration, and the Regulatory Analysis Review Group.

Summary

In summary, ERA finds that the appropriate premium for reducing oil imports is $2.95 consisting of $2.25 due to the effect on world oil prices, $.40 due to increased national security, and $.30 due to the effect on the U.S. balance of payments and inflation rate. This basic premium was then reduced by $.93 to account for the increased costs of additional legal emissions. Finally, three dollars was added to account for the projected increase in gap between oil and coal prices. This produced a premium for reducing oil demand through the Act of about five dollars per barrel. (The analyses underlying the major components of the premium is contained in the report, "A Method for Estimating the Premium for Reducing U.S. Oil Imports." Copies are part of the record of this rulemaking proceeding and are available from the Office of Policy Analysis upon request.)

ERA then determined the ratio of the cost of using coal to the cost of using imported oil that was equivalent to this per barrel premium. Equivalence in this case means that it would result in the same number of conversions as the per barrel premium would, if this were added to the price of each barrel of oil consumed in the projected facility and the ratio were set at 1.0. Specifically, ERA used the Coal Utilization Model for the Industrial Sector (CUMIS) Environmental Analysis, Inc., for the Department of Energy to match the per barrel premium of about $5.00 with its equivalent ratio. This analysis indicates

that when petitioners submit comparative cost projections based on current prices remaining constant in real terms, a ratio of 1.3 produced the same projected number of conversions as the per barrel premium of five dollars.

Thus, ERA determined that the substantially exceeds index should be set initially at 1.3. This ratio incorporates the benefits premium noted earlier and is designed to ensure that the cost index is set so that the additional costs of using alternate fuels do not exceed the benefits to the Nation from reducing our consumption of oil and natural gas. This ratio will be revised from time to time to reflect significant changes in the consumptions and factors used by ERA in formulating the ratio. ERA believes this ratio is reasonable and in full accord with the purposes of the Act as set forth by the Congress.

Various of the models and analyses used in arriving at the substantially exceeds index have not previously been available for public comment. Public comment on these studies is invited for the period of comment allowed on these Interim Final Rules.

Cost Calculations (§§ 503.5 and 505.5)

Section 212 of the Act provides that ERA must grant an exemption from the prohibitions of the Act when alternate fuel supplies are available only at a cost which substantially exceeds the cost of using imported petroleum. After evaluation of the comments received during the public comment period, ERA is now proposing interim rules which provide the criteria, methodology and evidentiary requirements to be used by a petitioner in petitioning for an exemption based upon the cost of building and operating a facility to burn an alternate fuel. In all cases, we have determined that the appropriate cost comparison must take into consideration the capital, operation, maintenance and fuel costs associated with specific fuel choices, and they must be expressed in real terms [8] discounted to present value. The following sections address specific aspects of the cost calculation and include a discussion of certain modifications which are now being adopted by ERA in these interim rules in response to the comments received on the proposed regulations.

a. *Alternative cost comparison methodologies.* We propose to use a ratio index in making cost comparisons to reflect the difference between the cost of using imported petroleum and the cost of using an alternate fuel. In preparing your petition for exemption, you must construct a ratio comparing the present value of the cost of using an alternate fuel to the present value of the cost of using imported petroleum in your facility. If the cost ratio you obtain is higher than the ratio (index) designated by ERA in its rules, you will have demonstrated to ERA that the cost of using alternate fuels substantially exceeds the cost of using imported petroleum, and we will grant the exemption you requested. If, however, the ratio obtained is equal to or less than the index, you will be denied the exemption. Sections 503.5 and 505.5 of the interim rules describe this methodology in detail.

Some of the comments we received on the proposed methodology suggested that the net present value method and the incremental oil cost methodology were preferable to the cost comparison test we proposed. The net present value method consists of computing the differences between two discounted cash flows which are associated with two alternatives. The sign of difference—positive or negative—determines the alternative selected and, when used in private investment decisions, if the difference is zero, it does not matter which alternative is chosen. The incremental oil cost methodology is a variant of the net present value method in which the price of oil is adjusted upward by an increment which reflects the social value of using the oil. Again, the sign of the difference between the discounted cash flows determines the decision.

We rejected the pure net present value method because it operates purely from the private investor's perspective and therefore ignores the social cost of using oil which is embodied in the substantially exceeds index.

We rejected the incremental oil cost methodology because (1) it is not clearly superior to the ratio test, and (2) we believe the ratio test is more intuitively appropriate for the purpose for which the index is to be used. Moreover, as will be seen below, we calculated an incremental oil cost in arriving at a substantially exceeds index. The advantages of that method in identifying and quantifying the costs and benefits of displacing oil and gas are therefore not lost in the method which we have chosen.

Other comments suggested that the comparison take into account the petroleum that could be saved or the amount of revenue created by the investment. We considered these comments and concluded that (1) the setting of the substantially exceeds index adequately considers the benefits of the petroleum that could be saved, and (2) while the Act requires ERA to account for costs—e.g., total operating and capital—it does not require us, and we do not believe that it would be appropriate for us, to account for revenue.

In our opinion, the cost comparison methodology that we have chosen meets all the requirements of FUA and is for the purposes of the Act, equal to or better than the methodologies that were discussed in the comments. However, we still welcome comments on this methodology.

b. *Perceived Bias.* Comments received on the proposed regulations suggest that the cost test, as proposed, contains biases against the use of petroleum—high annual capacity factor, low discount rate—and that its employment could result in noneconomical decisions to use coal or other alternate fuels.

We believe that the definitions and values of the various elements of the formulas are fair and reasonable; their elements are discussed below.

c. *Specification of discount rates.* The cost calculation procedures as proposed in § 503.3 and § 505.5 require the use of real (uninflated) discount rates. In the proposed regulations, we had tentatively set discount rates for new powerplants at 3.5 percent per annum and estimated the discount rate for new installations at 7 percent per annum. The comments suggested that the discount rates, as proposed for use in the calculations, were too low. Some commentors also recommended that the discount rate provide for industry and firm-specific factors—two of which are risk and the return available from alternate investments. It was further noted in the comments that the 7 percent discount rate proposed for installations is inconsistent with a June 1977 Federal Energy Administration objective permitting a 20 percent return of investment.

We have chosen not to use firm-specific discount rates as some commentors have suggested because it would involve additional administrative complexity that we do not believe, given the purpose of FUA, is justified.

A firm- or company-specific discount rate, all else being equal, would increase the likelihood of the least efficient firms receiving an exemption on the basis of cost and reduce the likelihood of the more efficient firms obtaining an exemption on the basis of cost. ERA does not believe that, under an act designed to conserve petroleum and natural gas and to ensure they are available for their highest and best uses,

[8] "Real terms" means with the effects of inflation removed. Prices are expressed in the dollars of a specific year (e.g., 1979 dollars).

the opportunity to burn such fuels should vary inversely with firm efficiency.

For the purposes of the interim regulations, we have decided to use discount rates which are the means of samples of firm's real, after-tax, weighted averaged marginal cost of capital. These means are the results of a contractor study performed for ERA. The contractor analyzed a sample of over 100 Class A and Class B utilities and a sample of 50 energy-intensive industrial firms. The mean discount rate of the utility sample was 2.9 percent per annum, and the mean of the industrial firm sample was 7.7 percent per annum. We decided to use this particular study as a basis for setting the discount rate because it was more narrowly focused on the population most likely affected by FUA than other studies available to us. A summary of the study will be published in the **Federal Register** shortly. A copy of the report will be placed in the record of this rulemaking and will be available from ERA. We particularly invite comments on this study.

d. *Capital costs/outlays.* Numerous comments expressed the position that we have too narrowly restricted the cost items that can be included in "capital" costs in the proposed regulations. It was suggested that such costs must include land, rail/barge facilities, pollution control facilities, environmental offsets, and transmission costs.

After consideration of the comments, we have modified the regulations to provide that you must include all capital items for which cash outlays were required at the time the decision to build the facility was made. Capital outlays must also include outlays for fuel inventories (see below).

e. *Fuel inventories.* In computing capital, ERA will require that you include the facility and fuel costs of inventories which are customary in business practice. ERA has set uniform inventory requirements for steam turbine powerplants, combustion turbine powerplants, combined cycle powerplants and industrial boilers.

Data on fuel inventories on hand at each utility plant in the United States are gathered by the FERC on its Form 4. The data for oil-fired steam turbines and combustion turbine powerplants have been summarized for the years 1975 and 1976. For oil-fired steam turbine plants, the inventories were 81 and 75 days in 1975 and 1976, respectively; the average was 78 days of inventories. For gas turbines, 157 and 128 days of inventories were on hand in 1975 and 1976; the 2-year average was 142 days.

As for inventories held by major industrial users, the Strategic Petroleum Reserve Office of DOE has contracted for a study to be made of industrial inventory management in industry. This report, "Inventory Management in the Petroleum Industry," prepared by DOE under contract CR–13–70083–00, is the basis for our estimates of inventory practice by industry. Industry storage capacity is estimated at 2-to-4-weeks with the storage capacity maintained at one-half to two-thirds full. Therefore, we have concluded that common industry practice is to maintain 21 days' storage or keep installed storage tanks 60 percent full, whichever is greater.

ERA will treat fuel inventory for combined-cycle powerplants as being the same as combustion turbines—142 days. ERA will require that for the following facilities you include the following fuel supplies: steam turbine powerplants, 78 days; combustion turbine powerplants, 142 days; combined-cycle powerplants, 142 days; industrial boilers, 21 days or 60 percent of the installed storage volume, whichever is greater.

ERA intends to periodically update this data. ERA requests comments on the data it has used and on whether these inventories should be based on regional data. ERA is also considering the use of a uniform inventory specifications of 180 days. We invite comment on that proposal.

f. *Annual capacity factor.* In the proposed regulations we assumed 70 percent annual capacity factor for new powerplants in cost computations for exemption petitions but proposed to permit you to rebut the 70 percent assumption by demonstrating that your powerplant for which you seek an exemption would operate at an average capacity factor significantly different from 70 percent over the life of the unit. We also proposed to presume a 60 percent annual capacity factor for operation of a new installation in your cost computations, which could be rebutted with suitable engineering evidence.

The comments received on the annual capacity factor issue (1) suggested that ERA should make no presumptions of a particular annual capacity factor for installations as significant variances exist among units and (2) characterized the presumed 70 percent annual capacity factor for powerplants as unrealistic.

We partially agree with these comments and have modified the regulations accordingly. Thus, under the interim regulations, if you operate a powerplant and are computing cost calculations for use in an exemption petition for that powerplant, you may either (1) use an annual capacity factor of 70 percent or (2) conduct an analysis in which you economically dispatch the particular powerplant with all other powerplants on a regional basis. If you are granted an exemption on the basis of a petition in which you conducted your analysis on a regional basis, the exemption will be conditioned upon your not operating the proposed powerplant at an annual capacity factor higher than the one you developed in the dispatch analysis.

If you operate an installation and are computing cost calculations for use in an exemption petition for that facility, you must specify the annual amount of fuel that you will use in your facility rather than use an annual capacity factor. If we then grant the exemption you request in your petition, it will be conditioned upon your use of no more than the maximum amount of fuel you could have specified in your petition and still have been granted the cost exemption.

g. *Operating costs.* Comments also took the position that we have not properly identified the fixed and variable operating costs and that costs should reflect fuel, labor, maintenance, materials, utilities, taxes, insurance, and overhead expenses. After considering the comments, we have made the appropriate modifications so that you must include in your cost calculations all annual expenses for which you will be required to make cash outlays.

h. *Useful life of a facility.* The proposed regulations provide for a 35-year useful life for a powerplant and a 40-year useful life for an installation. Numerous comments favored equating a facility's useful life to its economic life or the venture life of the enterprise in which it is used. Alternatively, it was suggested that the useful life of a unit should be equated with the useful life used by the Internal Revenue Service for tax purposes.

We have considered these arguments but have decided that, with the exception of nuclear powerplants for which the useful life will be 40 years, no changes in useful life presumptions are necessary. For the purposes of FUA, the life of a facility must remain an approximation of its physical life and cannot be equated with the tax life of the unit or the venture life of the enterprise in which the unit will be involved.

i. *Interest paid during construction.* It was noted in the comments that the interest paid during the construction of a facility is an unavoidable and significant part of the capital cost of a new

powerplant. Since such payments are factors that are permitted to be considered in a powerplant's rate base, it was argued that they should also be included in cost comparisons for purposes of petitioning for exemptions under the Act.

We agree that outlays incurred during a facility's construction should be included in the calculations, and we have modified them appropriately. The outlays made in the years prior to your facility's commencement of operations are to be forward-valued from the year the outlay occurs to the year before the plant becomes operational. However, we will not recognize interest, *per se*, accrued during construction, as a capital outlay. Interest costs are imbedded in the cost of capital and are implicitly recognized in the discount rate used in the cost test. We recognize that certain jurisdictions permit utilities to capitalize interest during construction while others recognize capital expenditures as they are made through permitting cost of work in progress (CWIP) in the rate base. For the purposes of computing cost, we believe that recognition of capital outlays as they are made is compatible with the satutory definition of cost.

j. *After-tax treatment.* Comments noted that the "before income tax" treatment used in cost calculation for powerplants is inconsistent with the "after income tax" treatment accorded installations. We have revised the interim regulations to eliminate this inconsistency by providing for cost calculations to be made on an "after income tax" basis for all facilities. We have chosen after-tax treatment to reflect cash flows and not social costs; social costs are reflected in the substantially exceeds index. The tax rate will be the firm's marginal Federal income tax rate.

k. *Investment tax credits and accelerated depreciation.* A number of commentors stated that the treatment of investment tax credits and accelerated depreciation in the proposed rules was not in accordance with the Energy Tax Act of 1978. The interim regulations recognize tax credits and depreciation methods allowed at the time the petition is submitted.

l. *Consultation with State regulatory authorities.* Several commentors also noted that the proposed rules do not provide for consultation between ERA and the relevant State regulatory authorities on the determination of costs, in the case of a powerplant, as required by Section 103(a)(20) of the Act. ERA intends to submit copies of all petitions for powerplant exemptions requiring the use of the cost test to the appropriate State regulatory authority for review. ERA will consider all comments made by such authorities before granting or denying a petition by final order.

m. *Special cost test.* The special cost test, which is a comparison of cash flows over the life of the exemption, has been modified so that it is more consistent with the definition of cost as contained in FUA. The value of the discounted cash flow of the capital investment is now annualized. This annualized value, operating and maintenance cash outlays, and fuel cash outlays are then discounted over the life of the exemption. Your comments on this modification are solicited.

n. *Price projections.* The proposed regulation specified that all expenditures be expressed in real terms using the prices in effect at the time the petition is submitted. Commentors observed that this treatment assumes that all costs escalate at the same rate and recommended that the petitioners have the option of using differing justifiable escalation rates. Commentors were particularly concerned about not being allowed to recognize the impact of escalating costs of oil.

For administrative simplicity ERA will require the use of real prices in effect at the time the petition is submitted. We do, however, recognize the relative escalations in fuel prices (along with other factors) which are embedded in the substantially exceeds index.

o. *Fuel price.* The proposed regulations contained a formula for adjusting the price of petroleum products so that it would approximate the replacement price. The proposed regulation also required you to use the price of No. 2 distillate fuel oil as your fuel price if you planned to use natural gas.

Commentors correctly pointed out that the formula overstated the replacement cost of the fuel in two ways. First, if the petitioner is planning to use imported petroleum products, the formula should not be applied. The fuel price is its replacement price. Secondly, where the petitioner used domestic petroleum products, the total price of the product was adjusted. The portion which should have been adjusted was the crude oil used in the refining process and not the value added by refining, transportation, marketing, etc.

Commentors recommended that petitioners proposing to use natural gas be allowed to use the price of No. 6 residual fuel oil instead of the price of No. 2 distillate fuel oil in the cost calculations. Some of the commentors pointed out that requiring a petitioner to use the price of distillate for a proposed gas-fired facility ERA would create an incentive for petitioners to propose using residual oil rather than natural gas.

After considering the comments, we have decided to modify the formulas used to compute fuel prices; however, the goal of approximating replacement price is unchanged. If you use an imported, refined petroleum product, your fuel price will be the price you pay for it plus the entitlements received by the importer, if any. If you use domestically refined petroleum products, your fuel price will be increased by the difference between the price of imported crude oil and the price of composite crude oil.

ERA has re-evaluated the potential impact of requiring the use of distillate oil rather than residual oil for proposed gas-fired facilities and shares the concerns expressed by the commentors. In order to eliminate the incentive to propose oil use rather than gas use, ERA will require the use of No. 6 residual fuel oil prices. However, No. 6 residual fuel oil must meet the air quality standards of your air quality region.

General Requirement—No Alternative Power Supply (§ 503.7)

In Section 503.7 of the proposed regulations published at 44 FR 5815 (January 29, 1979), ERA set forth the criteria for demonstrating that there is no alternative supply of power. Many comments were received in response to this proposal.

A few commenters stated that by imposing conservation measures under the regulation ERA is indirectly regulating utility rate structures which is not authorized under FUA or PURPA. ERA does not intend to regulate rate structures either directly or indirectly. However, in making its determination on alternate supply of power, ERA will require information as to whether the petitioner has considered certain conservation programs, whether they are cost effective, and how they were or will be implemented. In addition, if the programs were determined by the utility to be cost effective but are not being implemented, the utility will be expected to offer an explanation. Rate designs which support fuel conservation are one of many possible programs which can be examined in this manner.

Many of the comments stated that ERA has no authority to require that a utility meet load requirements with existing facilities by improving the performance of existing facilities, employing system conservation

resources, implementing load management techniques and assisting end use customers to conserve electricity. They state that this requirement conflicts with various state laws and with the National Conservation Policy Act (NECPA) and the Public Utility Regulatory Policies Act (PURPA). The FUA does not require such techniques, but allows ERA to limit the use of oil or gas if there is some potential for savings through conservation. ERA believes that energy made available through the efficient use of existing facilities and the implementation of cost-effective conservation measures should be considered as alternate supplies of power within the meaning of Section 213(c) of the Act. ERA has revised the regulations to require such measures only when they are cost-effective. ERA invites your comments on how best to determine whether a particular fuel conservation measure is cost-effective relative to the construction of a new plant. A number of state public utility commissions and attorneys general commented favorably on ERA's proposals under this section. They stated that the conservation provisions of § 503.7 are of critical importance since they recognize the need for conservation, improving performance of existing systems and load management techniques as power supply alternatives. In implementing this section ERA will not impose any requirements that are in conflict with state laws, PURPA or NECPA.

In the proposed regulation petitioners were required to evaluate purchasing electricity until an alternate fuel-fired plant could be operational as well as separately evaluating both purchasing electricity and operating an alternate fuel-fired plant. Several comments state that purchasing power for extended periods of time is not a reasonable option because no region would have excess capacity over such a long period. ERA has modified this requirement. Section 503.7(b)(2) now requires petitioners to examine the availability of purchased power and conservation measures as a reasonable option during the first year of scheduled operation for the proposed oil- or gas-fired unit. Petitioners would have to demonstrate that the reserve margin in the electric region would fall below 20 percent in the absence of the proposed plant during the first year of proposed operation after considering conservation measures and purchasing power in order to meet the criteria for this requirement. ERA may consider certain cases where the reserve margin exceeds 20 percent with suitable justification from the petitioner.

However, if the utility's proposed plant would not become operational within a few years, ERA may not agree that purchased power will be unavailable for the first year of scheduled operation. Projecting future demand for more than a few years is speculative due in part to the recent slowdown in demand growth. In an electric region or on a large utility system a small percent decrease in the annual growth rate of demand could eliminate the need for the additional powerplant. The showing required by the Act concerning the unavailability of an alternate supply or power is a showing that an alternate supply will not be available when it is needed. If the period in question is too far in the future, it may be premature to conclude that an alternate supply will not be available when it is needed, notwithstanding a present inability to obtain a satisfactory commitment from an alternate source.

Several commenters argued that Section 213(c) of FUA does not authorize ERA to require a consideration of alternate fuel-fired powerplants as an alternate power supply. They support their argument by asserting that Congress did not intend that petitioners seeking exemptions under Sections 212(d), mixtures; (e), emergency purposes; and (f), reliability, of FUA be required to examine alternative sites as required in § 503.7. The commenters contend that Section 213(c) of FUA only required consideration of purchasing power from other utilities. ERA has modified the regulations to eliminate the requirement that petitioners consider alternate fuel-fired powerplants under this section of the regulations.

ERA received several comments recommending that the term "reasonable distance," as used in § 503.7 of this Interim Rule, should be treated as a factor independent of cost considerations. Defining unreasonable distance in cost terms, it is argued, is not what Congress intended, and the reasonable distance concept should be explicitly defined as including either the state or some region less than the electrical region.

ERA's Interim Rule on alternate supply of power requires that the utility examine alternative sources of purchased power. First, with respect to purchased power, ERA believes that it is in accord with the intent of the Act in defining "reasonable distance" to include the concept of "reasonable cost" (including transmission cost). Second, ERA has defined the area of solicitation. ERA believes that the utility should determine the availability of firm purchased power by soliciting through letter exchanges and advertisements offers to sell power from all utilities within or contiguous to the electric region, from all nonutility suppliers within the petitioner's service area, and from such other sources as ERA may suggest. And third, ERA will additionally consider any factors cited by the utility that it feels renders a distance unreasonable, even though the cost is reasonable.

Several comments received by ERA suggest that the determination of "reasonable cost" under Section 213(c) of the Act should not be equated with the cost test under the alternate fuel supply exemption, which serves as the determinant of a "substantially exceeds" cost standard. ERA agrees and has revised this regulation to add a new test for determination of the reasonable cost standard for alternate supply of power. This test, which is independent of the "substantially exceeds" cost test, requires a demonstration that you made diligent efforts to purchase firm power for the first year of operation of your proposed powerplant at a cost that is less than 10 percent above the annualized average cost of generating power in such powerplant. ERA has specified certain costs which you must include, but you may select your own cost computation methodology (provided that your results serve as a meaningful basis for comparison with the costs of purchased power).

Several comments stated that § 503.7 failed to require that ERA consult with the FERC before making any findings under Section 213(c) of FUA. ERA has corrected this omission by adding § 503.7(d) to the regulations.

One comment noted that ERA's data requirements on retirements and on other areas are difficult to obtain. ERA has simplified that data requirements by focusing the reliability determination upon the first year of operation of your proposed powerplant. ERA may arrange with the National Electric Reliability Councils to collect data pertinent to the utilities in their respective electric regions, and this data will then be made available to the petitioning utilities.

A few comments requested that ERA only consider contracts for the purchase of firm power under § 503.7(b)(4) of the proposed regulation and that contracts for interruptible power or power subject to energy payback should be excluded from consideration. ERA has modified the regulation to make clear that only

firm power contracts need be considered.

Several comments contend that the requirement that purchased power be considered before an exemption will be granted will force most municipal systems to become merely distributors of power rather than generators of power. FUA requires that purchased power be considered before an oil- or gas-fired plant can be built. ERA's regulations conform with this FUA requirement.

Several comments note that by recognizing purchased power as an alternate fuel, the regulation may serve to promote the use of older, less efficient oil-fired plants. They state that by building the proposed oil-fired plant, overall oil consumption may be lowered. ERA recognizes that one of the purposes of FUA was to promote the replacement of old inefficient oil- or gas-fired plants with new efficient oil- or gas-fired plants. ERA believes, however, that that purpose must be accommodated to the overriding central purpose of FUA, which is to displace and conserve oil or gas. Indeed, Section 102(b)(7) states that the purpose is to encourage the modernization of only those oil or gas burning units that cannot utilize coal or other alternate fuels. To read Section 213(c) as these commenters do would largely take away is meaning and would not further the overriding purpose of the Act. (See Preamble, § 504.1, Increased Use of Petroleum by Existing Powerplants for a discussion of use of purchased power for the purposes of that particular section.) The Act was intended to prevent the construction of new non-essential oil- or gas-fired plants. The use of these old powerplants is intended to provide a stop gap until the utility brings an alternate fuel-fired powerplant on line.

A number of comments pointed out that by reducing the alternate power supply requirement to a cost test and reliability analysis, ERA is ignoring the possibility of regulatory and construction delays as well as other impediments to satisfaction of the powerplant's scheduled date to become operational.

ERA has revised this section to require examination of the availability of purchased power during the first year of scheduled operation for your proposed oil- or gas-fired unit. Since this section no longer requires an examination of alternative powerplants, the effect of regulatory delays and the like are not relevant to alternate power supply.

Use of Mixtures—Temporary Exemptions (§§ 503.8 and 505.6)

The proposed rules contained a general requirement that petitioners for any temporary exemption must demonstrate whether the use of a mixture is economically and technically feasible during the period of the proposed exemption. Several commenters pointed out that while such a demonstration is required by the Act as a condition of approval of most permanent exemptions, the Act does not require the demonstration relevant to temporary exemptions and that ERA has no authority to impose this requirement in the regulations.

In view of the public comments and the fact that petitioners for temporary exemptions are committed to comply with the prohibitions of the Act through the future use of alternate fuel, ERA has deleted the subject requirement from these interim regulations.

Use of Mixtures—Permanent Exemptions (§§ 503.9 and 505.7)

ERA received comments that since fuel mixtures are not readily available for commerical use, a petitioner for a permanent exemption should not be required to consider a particular mixture until ERA and industry agree that the use of the mixture is feasible in any industrial application. The commenters evidently were referring to specific mixtures such as certain types of coal/oil slurries. The Act, however, defines "mixture" as a combination of fuels burned simultaneously or *alternately* in the same unit. Many mixtures of petroleum or natural gas and alternate fuels are currently being used commercially, such as mixes of wood or wood products and oil, and waste gases or byproducts and natural gas. Therefore, ERA is adopting the rule as proposed.

Use of Fluidized Bed Combustion (§§ 503.10 and 505.8)

Commenters stated that ERA has, in effect, shifted the burden of finding technical or economic infeasibility for fluidized bed combustion (FBC) by requiring a petitioner for a permanent exemption to examine in the Fuels Decision Report the feasibility of utilizing fluidized bed combustion technology. The commenters stated that the Secretary, not the petitioner, has the responsibility of making the feasibility finding pursuant to section 213(a) of the Act. ERA concurs and the regulations have been modified accordingly. The interim regulations now state that a petitioner will not have to make a demonstration concerning the technical and economic feasibility of fluidized bed combustion *unless* ERA has made a generic or site-specific finding.

In recognition that fluidized bed combustion units of the size covered by FUA are not yet commercially available, ERA solicited comments on what criteria the agency should use to make a site-specific or generic finding that the use of a method of fluidized bed combustion is feasible. Some commenters asserted that ERA is not authorized to make a generic feasibility finding, but instead may only make a site-specific finding. We believe that we may make either a site-specific or generic feasibility finding, since the legislation does not specify the type of finding required.

With respect to the criteria which should serve as the basis for such a finding, commenters disagreed with our suggestions that a demonstration project, engineering studies or reports, or the first sale of a prototype unit would be sufficient. One commenter felt that a feasibility finding could not be made until two to four units of the size covered by the regulations have been in use at least 1 year. Another commenter stated that 10 large units must be in reliable service prior to making a feasibility finding.

We have not yet decided what criteria we will use to make a finding. In concert with DOE's Offices of Energy Technology and Resource Applications, we intend to monitor the development of fluidized bed technology. When the offices agree that the technology has progressed sufficiently, we will initiate a rulemaking proceeding to determine whether a generic finding can be made that a method of fluidized bed combustion is technically and economically feasible. Issues such as (1) the criteria which should serve as a basis for the finding; (2) the capability of FBC to meet variable heat requirements; and (3) other technical issues raised in response to the November 17, 1978 Federal Register Notice will be addressed in that future rulemaking. Prior to and after such rulemaking, if necessary, ERA reserves the right to make site-specific findings of feasibility. As with generic findings, these findings would be rebuttable under the provisions of §§ 503.10 and 505.8 of these regulations.

Alternate Site (§ 503.11)

The Act provides that, in order to qualify for a permanent exemption for lack of alternate fuel supply, site limitations, environmental requirements, inability to raise capital, state or local

requirements, or intermediate load, you must show that your powerplant cannot use alternate fuels at reasonable alternative sites. ERA proposed criteria for determining reasonable alternative sites in § 503.11 of the November 17, 1978 proposed regulations.

Comment was received that EPA had exceeded its legal authority and was unreasonable in insisting that utilities consider sites outside various geographical areas. EPA disagrees and notes that it is not rare for utilities to consider sites far outside their geographic areas. Therefore, ERA has not changed the proposed criteria.

Terms and Conditions (§ 503.12 and § 505.9)

Commenters stated that ERA had overstated the purpose of Section 214 of the Act which provides the Secretary with the authority to prescribe terms and conditions for any exemption granted. We are convinced that Section 214 gives the Secretary broad responsibility to prescribe such terms and conditions as he deems appropriate. In doing so, Congress has placed a heavy responsibility on the Secretary to ensure that the objectives of the Act are maintained through this section. We recognize, however, that we may not and certainly will not impose terms and conditions which are so arbitrary and capricious as to be unreasonable.

Other commenters contended that ERA cannot condition exemptions on the implementation of conservation measures, since such requirements are contrary to the provisions of the National Energy Conservation Policy Act (NECPA). In addition, comments were received which contended that conservation measures could be imposed only on the unit. Finally, comments were received which stated that ERA could not condition an exemption on the type of oil or gas used.

Based upon the explicit language of Section 214(a) of the Act, ERA has the authority to impose any reasonable terms and conditions it deems appropriate, including terms and conditions requiring the use of effective conservation measures which are practicable and consistent *with the purposes of the Act.* The purposes of the Act explicitly address the need to reduce oil imports, to minimize the use of petroleum and natural gas, and to conserve petroleum and natural gas for future generations. Thus, we believe that Section 214(a) gives us the authority to impose such conditions as the efficient use of oil and gas at a site, and the use of a fuel which best meets the purposes of the Act. ERA has no intention of imposing conditions which would require noncompliance with other statutes such as NECPA.

In the preamble to the proposed rule, ERA stated that it was considering conditioning an exemption which allows a petitioner to use oil on a requirement that he use no more than a specified minimum amount of oil, or possibly use no oil at all, in the exempt unit in the event of a national emergency which results in the reimposition of oil allocation controls. Commenters stated that ERA has no authority to impose such a condition since such authority to prohibit oil or gas use is vested in the President pursuant to section 404(b) of FUA. We will limit any prohibitions to the scope of our legal authority, and believe that this issue is best resolved in the context of a particular case.

The suggestion was made that ERA should define the term "milestone" as it applies to the revision of compliance plans. Because of the individual nature of each exemption which may be granted, the meaning of this term will differ with each petitioner. Therefore, milestones will be indentified on a case-by-case basis.

Lack of Alternate fuel Supply (§§ 503.21, 503.31, 505.11, and 505.21)

In the November 17, 1978 Federal Register notice, we proposed, under the Evidence portion of this exemption, that the petitioner solicit at least three bids from at least 25 percent of the supplier market for an adequate and reliable supply of alternate fuel. The comments received indicated that this requirement was ambiguous. If fewer than three suppliers comprise 25 percent of the supplier market, must the company get a minimum of three bids anyway? If five suppliers comprise 25 percent of the supplier market, must the company get three or five bids?

ERA recognized that the requirement raises the question of what constitutes 25 percent of the supplier market, and that it might be anti-competitive since it tends to favor large companies over smaller companies. We have therefore changed the language in the Interim Regulations to state "at least five bids from suppliers who could reasonably be expected to supply an adequate and reliable supply of the quality and quantity of alternate fuel needed." The submission of five bids will not automatically fulfill the requirements for the evidence supporting the petition. If we determine that the bids submitted are not a representative sampling of the suppliers who can be reasonably expected to provide an adequate and reliable supply of the particular alternate fuel, we may require additional bids before making our decision on the exemption.

We believe that the revised language will encourage petitioners to seek supplies from both large and small companies, since the requirement has been changed to include bids from only companies which can actually provide supplies of alternate fuels. In addition, we expect that the revised language will assure that a good faith effort is made by the petitioner in seeking his bids.

Federal/State Environmental Requirements (§§ 503.23, 503.34, 505.13, and 505.24)

A number of commenters objected to the requirement in the proposed regulations that an applicant for a permanent exemption on environmental grounds first apply for all necessary environmental permits and receive a final determination from EPA or the state prior to petitioning for an exemption from ERA. Some commenters recommended that this requirement be dropped entirely; others advised that it be used only in those cases in which an applicant's ability to comply with environmental requirements could not be easily determined by submission of other evidence or by joint consultation between the applicant, ERA, and the appropriate agencies. Some commenters suggested simultaneous filing of permit applications and petitions for exemption, while others proposed that ERA process its own petition first but leave the final determination up to EPA and other permitting agencies.

As a result of these comments, we have dropped the requirement that an applicant receive Federal and State environmental permit denials prior to petitioning for an exemption and, instead, have made the permit process an option the applicant is free to pursue at any stage of the petitioning process if he believes that this evidence would strengthen his case for an environmental exemption. If the applicant does elect this option, however, he must submit to ERA a copy of the permit application, as well as any supporting documentation, administrative records, and permit decisions as these items become available. All other evidence required by paragraph (b) of §§ 503.34 and 505.24 is necessary, at a minimum, to support the applicant's claim, and the regulations have been revised to describe these mandatory requirements in greater detail. The same subsection also allows the applicant to submit any additional documentation that he believes would be useful.

Regardless of which option the applicant decides to pursue, ERA encourages the applicant, prior to deciding to submit an exemption petition, to consult with EPA and other applicable permitting authorities regarding options for operating an alternate fuel-fired facility in compliance with applicable environmental requirements. The applicant may also seek consultations with EPA and ERA jointly.

We believe that this change in the exemption process will serve to emphasize the primary test for obtaining an environmental exemption; namely, the showing of physical (as opposed to economic) impossibility of complying with applicable environmental requirements. A permit denial may be submitted as evidence of an inability to comply with environmental requirements, but that evidence alone does not automatically qualify a petitioner for an environmental exemption. The presentation to the State or Federal permitting agency will not necessarily address alternate fuels or methods of compliance or their costs—all central concerns under FUA. Moreover, the mission of environmental permitting agencies is to pass upon the particular fuel and method of compliance proposed by the applicant. Their mission is not to seek out and insure that the petitioner has considered all reasonably available alternate fuels, and all other reasonably possible ways of complying, nor is their mission to insure that petitioner's cost esimates for compliance are reasonable. In short, the permitting agencies may be institutionally indifferent to an applicant's inability to comply by means of a particular fuel and method of compliance which he has chosen, or to the fact that the method which he has chosen is very expensive. Because the scope of inquiry of the permitting agencies is so different from that of ERA under FUA, denial of a permit cannot of itself be dispositive of an environmental exemption application.

Thus, we will evaluate all of the evidence submitted, which must include, at a minimum, the material requested in § 503.34(b) (5) and (6) and § 505.24(b) (5) and (6), to determine whether you have demonstrated that, despite the use of pollution control equipment which would provide for maximum possible pollution reduction, and despite examination of the regulatory options available to you, you cannot comply with applicable environmental requirements with use of any of the available alternate fuels.

We recognize that meeting the burden of physical impossibility by showing that maximum possible pollution reduction cannot achieve compliance with applicable environmental requirements may result in a showing that goes beyond that required when seeking a construction permit. For example, if you propose to locate in a Prevention of Significant Deterioration (PSD) area, for purposes of an environmental requirements exemption, you must show inability to comply with environmental requirements using pollution control equipment which would provide the maximum possible degree of reduction despite the fact that EPA or the state may require a less stringent standard. Under these circumstances, the fact that you may not be able to secure a permit (or may have already been denied a permit) for a facility at which you proposed to install technology generally recognized as BACT is not controlling in establishing whether it is physically possible to comply with applicable environmental requirements. You must establish that even if you were to take all actions possible, the facility could not comply with the applicable requirements. Failure adequately to provide this evidence will result in a rejection of your petition.

A few commenters, including EPA, objected to the requirement that an applicant for an environmental exemption also attempt to secure variances, SIP revisions and redesignations of PSD areas on the grounds that this is not authorized by FUA. Such comments relied on the provisions in the Act which state that the Act should not be construed to permit any existing or new source to delay or avoid compliance with applicable environmental requirements.

This evidentiary requirement, however, does not delay nor avoid environmental compliance, but rather requires analysis of the availability of all options available to any source in attempting to meet Federal and State environmental requirements. We believe not only that FUA allows ERA to require such an analysis, but also that the legislative intent is clear that inquiry into the availability of regulatory options should be an integral part of a diligent and good faith attempt to bring a facility into environmental compliance while using an alternate fuel. Section 103(a)(17)(A) of FUA defines "applicable environmental requirement" to include "any standard, limitation or other requirement . . . taking into account any variance of law. . . ." Congress thus intended that applicable environmental requirements not be narrowly construed to mean only standards, criteria or other specific limitations on pollution. Rather, it should be interpreted broadly to mean all requirements which could be imposed or allowed by the appropriate legislation. This clearly must include those regulatory options, such as variances and SIP revisions, which, if obtained, would allow construction and operation of a facility in compliance with that legislation. Until these options are pursued, we cannot establish the limits of what constitutes applicable environmental requirements in a particular case.

There is an additional line of argument from a policy perspective. Without the exemption provisions, you would be faced with the choice under the FUA prohibitions of compliance or of not constructing the facility. We reasonably assume that under those circumstances you would pursue all regulatory options available to you in a sincere effort to construct the facility. We, therefore, believe that it is also reasonable to require you to pursue those options with equal diligence in order to establish your good faith effort to comply, which effort is a statutory prerequisite to obtaining an exemption on environmental grounds.

Furthermore, the language of § 503.34(b)(5) and § 505.24(b)(5) is tempered by the phrase "as appropriate," indicating that you are to pursue these regulatory options only insofar as they are actually feasible. However, you bear the burden of establishing both which options are feasible in your case and what evidence is sufficient to show they were pursued to a satisfactory conclusion. We believe that this requirement provides for a workable accommodation between ERA and the appropriate Federal and State environmental laws, given the clear prohibitions of FUA and the expansive definition of applicable environmental requirements contained in it.

In the case of redesignations of Class 2 areas, ERA had decided to delete the requirement because it places too much of a burden on a single facility. Unlike SIP revisions and variances which may be site-specific, redesignations normally apply to large areas of land and would affect existing as well as new facilities in that area.

Some commenters suggested that ERA should treat facilities located in nonattainment areas differently from those located in PSD areas. The comments ranged from requiring less evidence to support an exemption petition from petitioners proposing to

construct in nonattainment areas to making a generic determination that no facility whose siting would trigger offsets or equivalent State requirements be required to burn coal.

At this time, ERA does not believe that nonattainment areas should be treated any differently from PSD areas since siting a facility in a clean area may be just as difficult as in a dirty area, depending on the individual circumstances. In regard to offsets, ERA does not agree that this requirement should be treated differently from other applicable environmental requirements. The offset policy was promulgated by EPA to allow for growth in nonattainment areas, and it would be inconsistent with FUA to reserve such growth for oil or gas fired facilities.

Future Use of Synthetic Fuel (§ 503.24 and § 505.14)

A number of commenters suggested that the regulations should not require a petitioner who is requesting a temporary exemption for the use of synthetic fuels to demonstrate that he cannot comply with the prohibitions of the Act by using an alternate fuel before the end of the proposed exemption period. The comments state that the Act only requires that the petitioner show that he cannot comply with such prohibitions by using a synthetic fuel until the end of the proposed exemption. ERA agrees with these comments and has changed the Interim Regulations accordingly.

Several commenters state that it is not possible to obtain binding contracts for synthetic fuel at the present time, and suggested that ERA grant the temporary exemption if the petitioner can demonstrate that he has, in good faith, entered into an agreement with a fuel broker to purchase specified quantities of synthetic fuels at a reasonable cost in return for the broker's commitment to exercise his best efforts to secure such fuel. Section 214(b) of the Act requires that a compliance plan incude "evidence of binding contracts for fuel, or facilities for the production of fuel, which would allow for . . . compliance [with the applicable prohibitons of the Act]." In addition, the Conference Report states that the required compliance plan for this exemption must include "evidence of binding contracts obligating the petitioner and supplier to provide the synthetic gas." S. Rep. No. 95–988, 95th Cong., 2nd Sess., p. 79 [October 10, 1978). We believe that the above language requires that a petitioner produce evidence of a binding agreement with a supplier of synthetic fuel or evidence of facilities for the production of synthetic fuel before we may grant an exemption.

A number of commenters suggest that DOE should act as a broker for synthetic fuel contracts to ensure synthetic fuel development. While DOE is working closely with industry to develop synthetic fuel, we believe that it is beyond the scope of ERA's authority, at least, to act as a broker in a synthetic fuel sales contract.

A number of commenters asked what would result if a synthetic fuel exemption expires (including any extension that may be granted) before a synthetic fuel can be used in the facility. We believe that in such an instance the facility will be subject to the prohibitions of the Act.

Temporary Public Interest Exemption (§ 503.25 and § 505.15)

A number of commenters objected to the costly and time-consuming process of completing an FDR, demonstrating that they are ineligible for other temporary exemptions, and proving they cannot use mixtures. Other commenters felt the term "public interest" should be more specifically defined and even broadened to include considerations of local environmental regulations as well as impacts on the economy and employment.

ERA has, in this Interim Rule, removed the requirement that you must, before being eligible for this exemption, demonstrate that you are not eligible for a temporary exemption based upon lack of alternate fuel supply, site limitations, and environmental requirements. In order to ensure that the net effect of granting the exemption is in the public interest, ERA will require only that you file a highly abbreviated FDR and demonstrate the inability to burn mixtures during the period the exemption is in effect. ERA may, nevertheless, waive all or portions of these requirements at a prepetition conference where justified by the conditions of the case.

In regard to specifically designating the term "public interest," Congress has given ERA discretion to decide the nature of the "public interest" in respect to FUA on a case-by-case basis. Any attempt to specifically define that term comprehensively could not encompass the wide variety of cases which could arise under this exemption category. As experience is gained under the Act, however, it might become possible to define particular sub-categories of public interest exemptions, as was done in the instance of the Special Public Interest Exemption For Use Of Natural Gas In Existing Facilities.

Impediments to alternate fuel burning as a result of local environmental regulations, however, should normally be considered under the State/Local Exemption.

Capital Availability Exemption (§ 503.35 and § 505.25)

Section 212(a) of the Act requires ERA to grant a permanent exemption from the Act's prohibitions wherever the use of coal or any other alternate fuel would not allow the petitioner to obtain adequate capital for the financing of a powerplant or installation.

1. Powerplants. § 503.35

The proposed regulation provided that, in order to qualify for this exemption, a petitioner must demonstrate that, despite good faith efforts to raise the additional capital required for an alternate fuel facility beyond that required for his proposed facility, the petitioner could not raise the necessary capital due to specific restrictions which could not be alleviated by the action of an appropriate regulatory authority.

The comments received by ERA pointed out (1) that the term "specific restrictions" on the ability of a utility to raise debt and equity capital needed clarification; (2) that the exemption would be essentially voided if a petitioner were required to show that the specific restrictions of his particular case could not be alleviated by the action of an appropriate regulatory authority; and (3) that the management projections of a utility's financial condition called for as evidence in support of an exemption petition could become the subject of litigation or affect rate cases.

After consideration of these comments, we have made some modifications to our proposed regulations. We have revised the proposed regulations to indicate that "specific restrictions" refer to limiting factors on a utility's ability to raise capital such as covenants on existing bonds. We have, however, retained the requirement that you demonstrate in your exemption petition that the specific restrictions pertaining to your utility cannot be alleviated by the action of the appropriate regulatory authority. The retention of this requirement is necessary to preclude national policy on fuel use being constrained by varying state regulatory policies. However, we are concerned about the effect of this requirement on small utilities. Therefore, we are considering limiting this requirement to class A and B utilities as defined by FERC.

We request your comments on the effects of this requirement on small utilities.

We have also retained the requirement for submission as evidence of management projections of financial conditions which are necessary in order for ERA to properly evaluate whether a petition requesting an exemption due to inability to raise adequate capital should be granted.

If you would like us to consider these projections confidential, appropriate provisions are provided for the treatment of confidential information under part 501 of these regulations.

We solicit your comments on the revisions.

2. Installations. § 505.25

Our rule for installations stipulated that to qualify for this exemption, the incremental amount of capital needed by a petitioner, within a consolidated corporation to use an alternate fuel rather than oil or natural gas, must be equal to or greater than 25 percent of the annual investment expenditures of the consolidated corporation averaged over the last three years. The proposed rule would not have required a new firm, which was not part of a consolidated corporation, to make the initial 25 percent showing, but would have required that the firm demonstrate that, despite its good faith efforts, it could not raise the capital for an alternate fuel facility beyond what it needed for the proposed oil or natural gas-fired facility.

The comments received on these proposed regulations indicated (1) that the proposed criterion—25 percent of the average annual investment expenditures for the past three years—was too arbitrary; (2) that it would be very difficult to identify a "new business firm"; and (3) that each petition should be reviewed on its particular facts (case-by-case) rather than be judged by an established generally-applicable criterion.

We agree with these comments and have modified the regulation accordingly. We have eliminated the concept of "new business firms," and under the interim regulations, each petition will be considered on a case-by-case basis. You will be required to demonstrate that, despite your diligent good faith efforts, you could not raise the additional capital required for an alternate fuel facility or that this inability is due to the existence of specific restrictions on your ability to raise debt and quity capital such as pre-existing, binding convenants on bonds.

We solicit your comments on these interim rules with respect to installations.

State and Local Requirements (§ 503.36 and 505.26)

Several commenters stated that a petitioner should not be required to provide an analysis of why it would be ineligible for a general exemption.

The State or local exemption is designed to provide a discretionary exemption allowing the burning of oil or gas in the instance where a petitioner could burn coal but for a local or a State requirement. (The local or State requirement cannot be a building code, nuisance or zoning law, and in the case of a State requirement, will be a requirement other than an applicable environmental requirement.) As stated in the Conference Report, the petitioner must demonstrate an inability to comply with the prohibitions, "because of the existence of a State or local law." S. Report No. 95-988, 95th Cong. 2nd Sess., 76 (1978).

If there are other reasons why the petitioner cannot comply, namely, the reasons which would entitle him to a general exemption, then he is not entitled to the State or local exemption because he is not in the situation that the State or local exemption was designed to resolve. The State or local exemption isolates the situation where a State or local requirement is the sole bar to the burning of an alternate fuel. In such a conflict between local or State and Federal interests, the Secretary is given broad discretion to determine whether acceding to the State or local interest "would be in the public interest and consistent with the purposes" of FUA.

One comment suggested that costs related to compliance with State or local requirements be included as a criterion in determining whether construction and/or operation of a facility is infeasible because of that State or local requirement. ERA notes, however, that the conference report states that the appropriate test is whether a State law or a local law would prevent the construction or operation of an alternate fuel-fired facility. Cost is not a criterion. Further, it is ERA's policy to handle all cost-related constraints to alternate fuel burning under the lack of alternate fuel supply exemption.

Several commenters stated that ERA should not require an applicant for this exemption to apply for a variance from the State or local requirement. ERA does not require that all applicants apply for a variance from a State or local requirement; however, ERA does require that an applicant examine the possibility of obtaining a variance and, where circumstances are favorable, ERA would expect the applicant formally to apply for a variance. This is in keeping with the legislative mandate that an applicant must make a good faith effort to comply with the prohibitions of the Act.

Finally, a commenter suggested that petitioner not be required to provide a description of involvement in activities pertaining to the enactment of a State or local requirement prior to April 20, 1977. ERA has adopted this suggestion and the interim rules have been modified to incorporate this comment.

Permanent Exemption for Cogeneration (§ 503.37 and 505.27)

In proposed § 503.37 and § 505.27, we outlined the eligibility, evidence, and reporting requirements that we planned to use in implementing § 212(c) of the Act, permanent exemption for cogeneration. Comments have been received on our proposals and, having been considered, are responded to below.

Most of the comments stated that the burden on a petitioner applying for a cogeneration exemption was far too great and that a petitioner should not have to demonstrate that he could not comply with the applicable prohibitions.

ERA recognizes the benefits of cogeneration and wants to ensure that where oil and gas would be saved, the cogeneration facility is encouraged. Accordingly, ERA has substantially changed the cogeneration regulation. ERA will not require the petitioner to demonstrate that an alternate fuel could not be used by the cogeneration facility. Instead, ERA will require a demonstration that the oil or gas to be consumed by the cogeneration facility will be less than would otherwise be consumed in the absence of the cogeneration facility by units which would not be expected to use an alternate fuel by reason of FUA. The test is whether the cogeneration facility would save oil or gas over and above the savings that FUA could reasonably be expected to achieve.

ERA has categorized the units which would not be expected to use an alternate fuel by reason of FUA. First, there are units that are or would be too small to be covered by the regulations. Second, there are FUA-covered units that are existing non-coal capable units or exempt units, and are less than 40 years old in the case of field-erected units and less than 20 years old in the case of package units. Units that are older than these years could reasonably

be expected to be retired soon and, if they were replaced, the replacement unit would have to consider the use of alternate fuels. If a cogeneration exemption is granted, and units less than 20 or 40 years old were included in the calculation of the oil or gas that would have been consumed absent cogeneration, these units would under the regulation then have to be retired or shut down. Third, there may be units that are not yet constructed that would be covered by FUA. To include oil and gas from these projected units in the "otherwise consumed" oil or gas savings calculation, the petitioner would have to demonstrate that each would be entitled to an exemption. In addition to these three categories, oil or gas savings may be attributed to displacing electricity from the grid.

The cogeneration exemption in these regulations also contains a public interest provision. ERA may grant an exemption even if oil or gas savings could not be demonstrated in certain cases where the facility will employ a technical innovation or where the facility would result in retaining industry in urban areas.

Some commenters said that the cogeneration exemption should be granted on the basis of economics, not fuel use. ERA, in its regulation, does not require any showing that cogeneration is economic or that petroleum or natural gas must be used. However, ERA interprets the phrase "other benefits" in the Act to mean that in granting an exemption, oil or gas would be saved and thereby imports reduced. The approach in these regulations, as outlined above, is consistent with the Act, and enables applicants to obtain a cogeneration exemption where cogeneration will save oil or gas over and above the savings the FUA could reasonably be expected to achieve.

A few commenters recommended that a cogeneration exemption not be granted if it would result in displacing coal or nuclear-generated electricity. ERA's use of the oil and gas savings approach takes account of the fuels used to produce the electricity that would be displaced. For example, there would be no savings attributed to that portion of the electricity that would have been produced by coal fired plants. ERA also requires that the fuel displacement calculation be based on a 10–year forecast that includes construction and retirement of plants within those 10 years. Therefore, to the extent that a utility has planned addition of new coal or nuclear plants, a petitioner would not be allowed to include in his oil and gas savings calculations the electricity displacement that is proportionally attributable to those facilities. As an aid to applicants, ERA is considering publishing projected 10–year fuel mix generation tables for electricity on an electric region basis to simplify the oil or gas savings calculations for those petitioners that may want to use them.

One commenter said that a cogeneration exemption should be granted if the facility will eventually use an alternate fuel. ERA notes that such a petition could be granted under the public interest section of the cogeneration exemption/or under an appropriate temporary exemption. However, since the exemption is discretionary, there would have to be a reasonable certainty that the alternate fuel would, in fact, be used.

Several commenters said that mechanical power should be permitted as an alternative to electrical power and that repowering a combustion turbine should be considered as a cogeneration facility. ERA notes that the legislative definition of a cogeneration facility requires that it produce "electric" power and any other form of useful energy (such as steam, gas, or heat) which is or will be used for industrial, commercial or space heating purposes. Adoption of either of these suggestions is therefore precluded. Mechanical power may be considered as an alternative to or in addition to thermal energy as part of the useful nonelectric output of the facility.

One commenter stated that the definition of electric powerplant should be clarified so that cogeneration facilities would be excluded from the electric powerplant definition if less than half of the annual electric power generation is sold for resale or exchanged for resale. Although one might read the Act in such a way, ERA disagrees with this interpretation. The wording of Section 103(a)(7)(A) indicates that a cogeneration facility would be exempt from the definition of electric powerplant only if less than half of the annual power generation was sold (for either resale or end use) or exchanged for resale.

One state recommended that a state should be able to apply for a "generic exemption" for cogeneration units built in accordance with an ERA approved state plan. The state would make a determination on the availability of alternate fuels and the economic justification for the use of oil. The petitioner would only have to certify to ERA that it was in compliance with the state plan. ERA is not prepared to delegate its exemption authority and responsibilities to a state at this time. However, the simplified process provided in these rules should help accomplish the objectives of the state proposal, and certainly encourage a broad systematic approach to fuel use planning.

Permanent Mixtures Exemption

(§ 503.38 and § 505.28)

Several commenters suggested that ERA has no authority to condition the grant of a fuels mixture exemption on a demonstration that the petitioner cannot comply with applicable prohibitions of the Act. ERA concurs and the requirement for this demonstration has been dropped from the regulations.

A number of commenters stated that ERA failed to state that new MFBI's qualifying for fuel mixture exemptions will not be required to use less natural gas or petroleum than 25 percent of the total Btu heat input of the mixture. ERA has revised its eligibility requirements to clarify that it will not require such minimum percentage to be less than 25 percent fn orders granting mixtures exemptions to new MFBI's.

There was some question concerning whether a petitioner requesting a mixtures exemption for a new MFBI and proposing to use 25 percent or less oil or gas would be required to demonstrate at the threshold that it was necessary to use any oil or gas at all in order to maintain operational reliability and a reasonable level of fuel efficiency. The statute might be read two ways.

First, it can be read to say that such a petitioner must demonstrate that some use of oil or gas is needed for reliability and fuel efficiency reasons. If ERA decides that the petitioner is eligible for the exemption and grants the exemption, ERA then could not require that the amount of oil or gas used be less than 25 percent of total annual Btu heat input.

Another construction of the Act says that so long as the new MFBI petitioner proposes to use a mixture containing less than 25 percent oil or gas, he does not need to demonstrate that any oil or gas is needed for reliability and fuel efficiency purposes. Instead he merely needs to certify that he will use no more than 25 percent oil or gas in order to be granted the exemption.

While the statute can be read to support the first construction, ERA, as a matter of administrative discretion, has decided that, in the early years of the program, the second construction should be employed to encourage the use of alternative fuels and mixtures. ERA may propose to change this approach in the future if it becomes evident that mixtures exemptions are being requested to avoid compliance with the

prohibitions rather than because an amount of oil or gas is actually needed for use with an alternate fuel.

ERA received comments suggesting that the use of less than 25 percent petroleum or natural gas in a mixture should be considered "control use" and therefore excluded from the prohibitions of the Act. ERA concludes that 25 percent petroleum or gas is much more than Congress intended be excluded from the definition of the primary energy source. The interim rules provide that the total amount of petroleum or gas excluded for the purposes enumerated in the definition of primary energy source in Section 103(a)(15)(A) of the Act cannot exceed 5 percent. This 5 percent must be included within the minimum percentages required to maintain reliability of operation for purposes of qualifying for a mixtures exemption.

Some commenters stated that the regulations should foster the use of innovative technologies in mixtures. It is ERA's intention to encourage the use of innovative technologies.

Emergency Purposes (§ 503.39 and § 505.29)

In §§ 503.39 and 505.29 of the proposed regulations, we outlined the proposed eligibility, evidentiary, and reporting requirements applicable to the emergency exemption for powerplants and installations and defined an "emergency" situation that may arise in the case of each type of facility. The comments received on these proposals are discussed below.

Various comments took the position that a petitioner should not be required to demonstrate an inability to comply with the applicable prohibitions of the Act in connection with submission of a petition for an emergency exemption under these subsections. We agree with these comments and we have modified the proposed regulations accordingly. Specifically, § 503.39(a)(1) and § 505.29(a)(1) relating to inability to comply with the FUA prohibitions, have been deleted. Additionally, § 503.39(c) and §505.29(c) have been modified so that the evidence required in support of an emergency exemption petition does not include a demonstration of an alternate fuels search.

The comments also called our attention to the narrow definition of "emergency" as it applies to the emergency exemption for installations [§ 505.29(b)] and suggested that the definition should be broadened to include as emergency situations fuel supply interruptions, equipment failures, temporary environmental restrictions and peak demands. We agree in part with this comment and we have expanded the emergency definition in § 505.29(b) to include the first three suggested situations. Peak demand, however, is a normal recurring occurrence, usually associated with certain times of the year or phases of the production process. Therefore, we do not agree that a peak demand situation constitutes an emergency as such demands can be anticipated. Our consideration of an emergency exemption petition based on peak demand needs would not be consistent with the purposes of the Act.

The comments also suggested that the definition of emergency in § 505.39(b), applicable to exemption petitions for powerplants, should be modified to include situations requiring curtailments of less than 10 percent of non-interruptible electric supplies to industrial customers and to allow operation in spinning reserve. We agree with these comments and we have modified the emergency definition in § 503.39(b) accordingly.

A number of comments suggested that rental boilers be excluded from the prohibitions of the Act. We have decided that we cannot relieve rental boilers categorically from the FUA prohibitions and maintain consistency between the interim regulations and the purposes of the Act. However, we have provided for their use and they will be treated under the appropriate sections of the interim regulations depending upon whether their use is anticipated or unanticipated. If you must use a rental boiler for emergency purposes, you must, as the operator of the unit, comply with the provisions of the interim regulations implementing either Section 404(g) of the Act (Emergency use of natural gas or petroleum) or Section 103(a)(15) (definition of primary energy source). These provisions, covered in Subpart M of Part 501 of these interim regulations permit the immediate use of the rental boiler, require you to report the use to use, and in the case of Section 404(g), of the Act set a maximum period of operation at 24 months. If you need to use a rental boiler for anticipated purposes, you must, as the operator of the unit, file a petition for the appropriate exemption. In this case, the scheduled equipment outage or the public interest exemption may be applicable.

Further, we will not include rental boilers in the aggregation provisions of § 500.2(c) and (d) defining powerplants and installations if they operate subject to the exclusion in the definition of primary energy source, Section 404(g) of the Act (Emergency uses of natural gas or petroleum), or certain temporary public interest exemptions.

Reliability (§ 503.40)

Section 503.40 of the proposed regulations sets forth criteria to be used in granting a permanent exemption for a new powerplant to prevent impairment of reliability of service. A large number of comments were received in response to ERA's proposal as discussed below.

Many comments were directed toward the use of the loss of load probability (LOLP) approach to assess reliability of service. One commenter commended the choice of the LOLP approach but others were critical of it, pointing out that an LOLP calculation cannot provide an accurate measurement of system reliability because of the many variables present in each system which are impossible to calculate. Several comments suggested that ERA utilize a reserve margin test rather than LOLP.

ERA has decided not to eliminate the LOLP calculation and replace it with a reserve margin test because reserve margin fails to take account of factors important to reliability such as outage rates, size of units, and load patterns. ERA believes that LOLP as an analytic tool provides the best baseline evaluation of reliability and that it is a generally accepted approach. ERA has, however, added § 503.40(a)(4) to the regulations to allow a petitioner to argue, at a prepetition conference, that other methods more accurately reflect the local situation. If ERA concurs, a petitioner may use such alternative methods in lieu of the LOLP. With respect to factors which may affect reliability yet are not included in an LOLP calculation, ERA notes that both the proposed regulations and these regulations allow flexibility so that a petitioner may present such a case. For example, transmission constraints and leadtimes may require that LOLP be calculated for an area other than the electric region. Energy constraints such as low stream flows at hydroelectric facilities may also require modifications in the LOLP calculation. ERA will consider arguments on a case-by-case basis concerning such factors or other region-specific occurrences, and may, after discussion with the petitioner, allow the use of modified methods that account for them.

Several comments asked why ERA proposed to apply a different LOLP criterion depending on when the proposed plant is to begin operation.

ERA believes that making a commitment to oil or gas-fired generation more than six years in

advance can be justified only if an extremely severe reliability problem is projected—hence, the one day in one year criterion. If a less severe problem is projected six years in advance, such a commitment should be delayed while alternate remedial measures are sought. If such measures fail, there will still be time to obtain an exemption and build a powerplant to prevent the LOLP from falling below one day in five years. Since the construction of new oil or gas-fired powerplants is a solution of last resort to a reliability problem, it may be tolerable to operate for a limited period at a somewhat lower—but still adequate—standard while more satisfactory solutions are being implemented. ERA believes that this approach is reasonable, particularly in light of the inherent uncertainty in forecasting future demand more than a few years in advance. ERA has, however, decided for these regulations to change the timing somewhat to allow a utility an additional year for the proposed powerplant to begin operation under each criterion.

A number of comments state that the proposed LOLP standard, which is as low as one day in one year in certain instances, might seriously jeopardize a utility's reliability of service. As noted above, this standard only applies if the proposed plant will not become operational within six years. Since it is ordinarily possible to build and have in operation an oil-fired powerplant within four years, the ERA criterion assures that adequate capacity can be brought online to prevent the LOLP from going below one day in five years.

Several commenters argue that Congress, in the Public Utilities Regulatory Policies Act (PURPA), instructed DOE to undertake an 18-month study of reliability standards, taking into account a long list of germane factors. They state that adoption of a uniform national standard before completion of that study would be premature and inconsistent with PURPA. The FUA only directs ERA to grant petitions for exemption on the basis of impairment of reliability and not to establish national reliability standards, as contemplated by PURPA. Thus, ERA believes that establishing minimum criteria for use in evaluating petitions for exemption due to impairment of reliability of service is not inconsistent with the purposes of PURPA. If better reliability criteria are developed during the course of the PURPA reliability study, ERA will consider their relevance to FUA exemption standards.

Several comments contend that reliability must be evaluated on a utility system basis since a utility builds additional capacity to meet its system demands and not the regional capacity demands. ERA believes that to achieve the maximum reasonable reduction in gas and oil consumption, it is imperative that planning and coordination be evaluated on a regional basis, not on the basis of a single, isolated system. Nevertheless, ERA will also consider evidence related to deficiencies of the petitioner's system.

A few comments asked why the proposed regulation requires that reliability information be reported for the first 12-month period of powerplant operation. They state that this requirement cannot be fulfilled with the presently available reliability assessment programs which only produce the information on a calendar-year basis. ERA agrees and has modified § 503.40(a)(2) to permit the LOLP calculation to be computed using any 12-month period that includes the date of initial operation of the proposed plant.

Several comments question ERA's predisposition in favor of combustion turbines and against other types of equipment such as combined cycle. They state that if ERA is genuinely interested in limiting oil consumption, it should prefer the use of more efficient equipment such as combined cycle. ERA has deleted reference to specific types of equipment. However, ERA points out that it has added a new section, § 503.40(c), (terms and conditions) which will be imposed on units which are granted this exemption. Operation of the powerplant under this discretionary exemption will be permitted only for the purpose of preventing an impairment of reliability of service. ERA, at the time it grants this exemption, will specify the "initial period of impairment" which will extend from the date of initial operation of the proposed powerplant until the earliest date that the LOLP will be less than one day in five years. Unless circumstances beyond a utility's control cause the LOLP to exceed one day in five years, either at the end of this period or at any subsequent time, the powerplant will not be permitted to burn oil or natural gas after the expiration of this initial period of impairment.

ERA has also added a new § 503.40(e) to make clear that a utility may apply for peakload exemption in addition to this exemption for the same unit. Both exemptions may be granted if the eligibility and evidence requirements of both exemptions are met.

A few comments stated that ERA should accept a state's evaluation of issues of reliability and need for power and should not duplicate the work of a state. ERA believes that power supply for an electric region is often not the exclusive concern of a single state. However, ERA may at its discretion consult with the appropriate state authority.

Permanent Exemption for Peakload Powerplants (§ 503.41)

In proposed § 503.41, we outlined the eligibility, evidence, and reporting requirements that we planned to use in implementing Section 212(g) of the Act, permanent exemption for peakload powerplants. Comments have been received on our proposals and, having been considered, are responded to below.

Most of the commenters said that the peakload exemption should be granted solely on the basis of certification and that the petitioner should not have to file a Fuels Decision Report nor supply information about the electrical region if the proposed plant was other than a combustion turbine.

ERA has dropped the requirement that a petitioner for this exemption file a Fuels Decision Report. Also the mixtures requirement with respect to this exemption has been dropped. However, ERA does require that a petitioner certify that the proposed powerplant will be operated solely as a peakload powerplant and to meet peakload demand for the life of the plant.

The conference report makes it clear that the exemption applies not only to hours of operation, but also to type of use, that is, for peakload purposes. In addition, the enforcement provisions for this exemption, Section 721(c) of the Act, relate to the necessity of using the plant to meet peakload demand. Accordingly, ERA is retaining in this regulation, in a modified form its request for certain information if the proposed plant is other than a combustion turbine. Combustion turbines are normally used to meet peakload demand and the high cost of using them at a higher capacity factor generally precludes use to meet intermediate load demand. Therefore, ERA will generally assume that if the proposed plant is a combustion turbine, the petitioner and ERA would probably agree on what constitutes peakload demand.

If, however, the proposed plant is to be other than a combustion turbine (a combined cycle or steam plant for example) ERA is requesting information on what constitutes peakload demand on the petitioner's system, the order of

dispatching plants, and the projected use of the proposed plant. ERA notes that economic use of a combined cycle unit usually exceeds 1,500 hours per year and may, in fact, be 2,000 to 3,500 hours per year. ERA needs the additional information so that it will be able to ensure compliance with this exemption and so the petitioner will have fully described what it is that he is certifying to. ERA solicits comments on how peakload demand should be defined for the purpose of these regulations.

ERA has added in the interim regulations a new subpart (c) entitled, "Additional Information," which outlines information you must submit with your petition. Specifically, we are requiring you to attach to your submission all data required under § 502.11 (Petroleum and natural gas use) and § 502.12 (Conservation measures) of these interim regulations. The data called for under § 502.12 will describe any oil or natural gas conservation measures you have taken or intend to take if the exemption you request is granted. These two categories of data are required by us to enable us to determine what terms and conditions will be appropriate for incorporation into the exemption (if granted) under our authority in section 214(a) of the Act (implementing interim regulations § 503.12). In addition, you will be required under (c)(3) to submit all data required by § 502.13 (Environmental impacts analysis). The submission of this information is necessary to enable us to meet our responsibilities under the National Environmental Policy Act (NEPA).

The comments pointed out that, where the peakload exemption is requested for a natural gas-fired unit, we should not require the applicant to submit with his exemption petition a copy of his application and supporting documentation made to the Environmental Protection Agency (EPA) for an air quality certification. In order for us to comply with the terms of section 212(g)(2)(A) of FUA, we must at least require you to submit, with your peakload exemption request for a natural gas-fired powerplant, the air quality certification by the EPA Administrator or the Director of the appropriate State air pollution control agency which will meet the requirements of § 503.41(a)(2)(ii) of the interim regulations, and thus, section 212(g)(2)(A) of the Act. We have, however, deleted from the regulations, as originally proposed, the requirement for submission of a copy of the EPA application and supporting documents.

EPA's or the State air quality agency's certification must indicate that the use, by the exemption petitioner, of coal or other available alternate fuels as a primary energy source in a particular unit will cause or contribute to a concentration of a pollutant within an area or region in which the national ambient air quality standard for that pollutant is or will be exceeded. The conference report states that "It is important to stress that the EPA or State agency must consider whether other available alternate fuels could be used before making such a certification." S. Report No. 95–988, 95th Cong. 2nd Sess., 78 (1978).

It was pointed out in some of the comments that we should not make the determination of whether a peakload powerplant is needed in the petitioner's system; rather, the appropriate State should do this. We do not intend to make determinations regarding the need for peakload plants and do not view either our proposed or interim regulations as suggesting or providing that we do so.

A number of suggestions made by commenters have been adopted in these regulations. These include the following: The reporting requirement is now in terms of "maximum number of kilowatt hours of permitted generation" rather than "maximum number of hours of permitted operation" as previously proposed. ERA will accept a certification from a duly authorized officer and not require it from the chief executive officer.

ERA received comments suggesting that the certification on peakload use should not be for the life of the powerplant since statutory or regulatory changes may intervene and other exemptions may later be granted. The peakload exemption, however, is a permanent exemption for the life of the powerplant. As clearly indicated in the conference report, the certification runs for the life of the powerplant.

Various comments recommended that we base the peakload exemption on "planned" use of the powerplant of 1,500 hours or less, but once we grant the exemption, the peakload unit should be free to provide emergency power as required by the operator's needs, regardless of the number of hours. It was suggested that, for us to do otherwise, we would be encouraging the construction of increased peaking capacity. We do not believe that the peakload exemption should be altered to account for emergencies which require operation beyond the terms of the peakload exemption. The Act and the interim regulations contain a separate emergency exemption. Further, section 721(c) of the Act provides for the operation of a powerplant with a peakload exemption in excess of 1,500 hours without penalty under certain circumstances involving peakload demand and unit system outages.

Intermediate Load Powerplants (§ 503.42)

The purpose of the intermediate load exemption is to encourage retirement of old units and investment in new, efficient oil burning units, where the new unit, even though it could not get an "applicable environmental standards" exemption if it burned any available alternate fuel, would cause or contribute to concentrations of air pollutants in excess of ambient air quality standards. The intermediate load exemption recognizes the social cost of burning oil or gas in situations where there would otherwise be a social cost from burning an alternate fuel, which would result in a contribution to pollutants in excess of ambient standards (though short of a violation of environmental requirements). The intermediate load exemption allows such new investment in such environmental circumstances only when the investment could not otherwise occur; that is, where the facility could not obtain at the proposed or at any reasonable alternate site a general exemption which would enable it to burn oil or gas. It thus allows such investment even though the petitioner could burn coal or other available alternate fuel at the proposed or some alternate site.

ERA is concerned, in situations where the generating capacity that you plan to replace consists of older units which may be approaching retirement, that despite your substitution of more efficient replacement capacity, the disparity in relative durations of use might result in long-term increases in oil use. ERA, therefore, invites your comments on an alternative approach whereby the phrase "equivalent capacity" in Section 212(b)(1)(B) of the Act would be interpreted as requiring that the "expected capacity-years" (design capacity multiplied by expected useful life) of your new powerplant would have to be offset by at least an equivalent number of "capacity years of early retirement" of the powerplants it will replace. ERA would set the nominal retirement age at 35 years. If you retired a 100–MW powerplant at 30 years, you would, therefore, obtain a credit to be applied against your new replacement capacity of "500–MW years of early retirement." Your construction of a single new powerplant, in this case,

might result in a sequence of early retirements of older and less efficient powerplants.

In addition to this proposal, ERA has addressed the foregoing concept by adding to this Interim Rule a section concerning terms and conditions. ERA intends to exercise its authority under Section 214(a) of the Act to attach terms and conditions to the grant of any intermediate load exemption to assure that the construction and operation of your new powerplant will not result in an increased consumption of petroleum in your system. In general, the grant of this exemption for your unit would be conditioned so that a decrease in the petroleum consumption of your system would result. Appropriate terms and conditions will, however, be determined on a case-by-case basis.

ERA received several comments on its proposed rule for the intermediate load exemption, suggesting that ERA's requirement that the units to be replaced cease operating within 30 days of commencement of operation of your new powerplant is contrary to the intent of the Act. ERA believes that this requirement is fully in accord with the provisions of FUA. The Act clearly requires the replacement of capacity, and not simply energy. This requires that at least as much capacity be removed from the system as is added in the form of the new unit. ERA, however, has permitted a 30-day delay for the shutdown of the units to be replaced in order to provide flexibility during the initial period of operation.

Several comments noted that ERA had no authority under FUA to require that the units to be replaced be coal capable. ERA has deleted this requirement in this Interim Rule.

One comment suggested that ERA's proposal to retain the option to periodically review your intermediate load exemption and to retain authority to terminate your exemption should suitable synthetic fuel become available, should be eliminated. ERA cites Section 212(h)(2) of the Act as the basis for its authority, which reads "The Secretary shall from time to time, review each exemption granted to a powerplant under this subsection, and shall terminate such exemption when he finds that there is available a supply of synthetic fuel suitable for use as a primary energy source by such powerplant." ERA intends fully to implement this provision.

The Use of Petroleum (§ 505.16)

ERA proposed in § 505.16 to permit certain MFBI's to file for exemptions, pursuant to Section 212.4 of the Act under certain conditions on an expedited basis. Consistent with the Act, this exemption was proposed to remain in effect only until regulations upon which action could be taken were issued.

In publishing these regulations, ERA has provided adequate means for processing exemption requests through the mixtures exemption (§ 505.25) and temporary exemptions, and sees no need for continuing § 505.16. That paragraph has therefore been excluded from the regulations.

Product/Process (§ 505.30)

ERA proposed that the product/process exemption be applied only to certain non-boiler categories, and since these categories are not the subject of this rulemaking, we are not promulgating rules for this provision at this time.

ERA received comments that installations should be permitted to apply for this exemption since Section 202(i)(2) specifically states that, in order to apply for this exemption, a petitioner must demonstrate that substitution of steam is not technically feasible. Since this rulemaking only covers boiler installations, and boilers generate steam, substitution of steam is always technically feasible for a boiler unit. Since a petitioner must demonstrate that substitution of steam is not technically feasible and boilers generate steam, ERA believes that any new boilers could not qualify for the exemption on the basis of product/process limitations.

Therefore, ERA has decided not to change the proposed regulation.

Permanent Exemption for Scheduled Equipment Outages (§ 505.31)

In proposed § 505.31, we outlined the eligibility, evidence, and reporting requirements that we planned to use in implementing Section 212(j) of the Act involving the permanent exemption for scheduled equipment outages for installations. Comments have been received on our proposals and, having been considered, are responded to below.

Most of the comments addressed the burden of requiring a petitioner to demonstrate that he is unable to comply with the applicable prohibitions of the Act. It was urged that where small amounts of oil or natural gas would be consumed, ERA provide a virtually automatic grant of exemption.

Upon consideration of the comments, ERA has modified the regulation to reduce the burden on petitioners, yet to retain showings where ERA believes it may be feasible to burn an alternate fuel. First, ERA requires a petitioner to demonstrate that his routine maintenance schedule does not permit or could not be adjusted to permit continuing production or other activity carried on at the site unless ERA grants this exemption. Maintenance is often accomplished with either rotating use of units or shutting down all units at the same time. ERA, therefore, believes that there will often be situations in which an additional unit that is oil or gas fired would not be required to accomplish routine maintenance.

However, in those instances where an additional unit that is oil or gas fired is required, ERA will reduce the evidentiary requirements if the scheduled outages (and thereby the scheduled use) of the proposed unit is 21 days per year or less. In such instances, an examination of the feasibility of using an alternate fuel will not be required. But if the scheduled outages exceed 21 days per year, ERA will require for this discretionary exemption an alternate fuels search. It may be quite feasible to use an alternate fuel in this circumstance, and if so, such use would be consistent with the purposes of the Act.

Some comments suggested that the proposed regulations implied that a boiler would not be allowed to operate on oil or natural gas during scheduled outages if it were normally operated on an alternate fuel at other times. The proposed regulations do not specifically preclude the use of oil or natural gas in an alternate fuel-capable boiler during scheduled outages; however, as already discussed, the burden of proof is on the petitioner for the exemption to demonstrate why the use of an alternate fuel would not satisfy its output requirements and, thus, why the use of oil or natural gas will be required during the outage.

Comments also suggested that a boiler should be allowed to operate in the event of both emergencies and scheduled outages under one exemption grant without having the operator apply for both types of exemptions. These exemptions, however, relate to two very different sets of circumstances not necessarily related to each other and requiring evaluation against different criteria before a decision can be made on the request. Accordingly, we are not adopting the position suggested by the comments. However, as a petitioner, you may request both a scheduled outage exemption and an emergency exemption for the same unit by means of a single petition. You will be required to meet the eligibility and evidence requirements for each of the exemptions. If you are

granted both exemptions for the operation of your unit, you must comply with the separate reporting equirements applicable to each exemption.

Fuel Classification—Part 507

In Part 507 of the proposed regulations published in the **Federal Register** on January 29, 1979 (44 FR 5860), we defined natural gas and petroleum as we use those terms in implementing the alternate fuels program under the Act. As published at that time, Part 507 was a refinement of § 500.2 (d) and (e) of our orginally-proposed regulations defining those two fuels (43 FR 53987, November 17, 1978). We have received comments on both our November 17, 1978, and January 29, 1979, proposals and are responding to them below.

Natural Gas Definition (§ 507.2(a) and § 507.3)

In our November 17, 1978, definition of natural gas we proposed that natural gas produced from wells with a maximum efficient-production rate (MEPR) of less than 250 million Btu's per day which were acquired on or after July 18, 1977, be classified as natural gas rather than as an alternate fuel. After further consideration of FUA's legislative history, we dropped the retroactive provision from the proposed natural gas definition published on January 29, 1979. The comments received on this issue favored our modification and recommended that it be retained in the final regulations. In accordance with the Act, and under the definition now contained in these interim regulations, we will not consider as natural gas any gas produced by the user from any well with an MEPR of less than 250 million Btu's per day regardless of the date of acquisition of such well.

In the January 29, 1979 proposed rules, we submitted proposed criteria for determining "commercial unmarketability" requiring the petitioner to demonstrate that he could not obtain a bona fide offer from an interstate, intrastate, or local gas distribution company for such gas and that it be transported directly from the well to his facility. Comments were received which contended that gas commingled in a pipeline serving other customers should not be automatically designated commercially marketable. Other comments maintained that we had not adequately specified the criteria for determining commercial unmarketability by reason of "quality." We have decided that the criteria published on January 29, 1979 (44 FR 5860) in § 507.3(b), require further development prior to promulgation of interim regulations. We have therefore reserved under § 507.3 a subsection with respect to commercial unmarketability and will promulgate an interim rule after further consideration of the comments and other technical, financial and marketing information available to us.

Much attention was given by ERA and others to excluding from the definition of "natural gas" certain gases designated by the Natural Gas Policy Act (NGPA) in § 107(c) as "high-cost natural gases." We believe that § 107(c) of the NGPA constitutes a good basis for designating gases which should be excluded from the definition of natural gas and we have substantially accepted this proposal. We will recognize as "commercially unmarketable" the natural gases from geopressured brine and Devonian shale where these gases are produced from wells spudded (i.e., for which surface drilling began) before 1990 and all occluded methane produced from coal seams when these gases are gases within the definition of section 107(c) of NGPA. Furthermore, we will presumptively recognize as "commercially unmarketable" those high-cost natural gases recognized by the Federal Energy Regulatory Commission (FERC) under section 107(c)(5) of NGPA as being produced under "such other conditions as the Commission determines to present extraordinary risk or costs," if produced from wells spudded prior to 1990. However, we reserve the right to review any FERC designations of gases under section 107(c)(5) on our initiative and to make our own determination regarding their commercial marketability. We will not recognize, on a generic basis, the so-called "deep gas" produced from completion locations at a depth of more than 15,000 feet as categorically "commercially unmarketable" although section 107(c)(1) of NGPA classifies it as a "high-cost" natural gas since most of this gas would be of pipeline quality. We will, however, review any claims asserted by a user that these and/or any other gases are "commercially unmarketable" by reason of their quantity, quality, or distance from existing transportation networks on a case-by-case basis. [§ 507.3(b).]

Our reservation of authority to depart from FERC designations under Section 107(c)(5) and our rejection of "deep gas" as commercially unmarketable require a comparison of the purposes of FUA and those of the NGPA. The NGPA has among its primary objectives the development of high-cost natural gas resources. For its part, FUA seeks to a large extent to reserve these and other more conventional sources of natural gas for high-priority users, such as the residential and small commercial sectors, by prohibiting their use by powerplants and installations. As a result, while we substantially accept the NGPA designations, we will continue to assess future classifications of gas under the NGPA in light of the purposes of FUA.

Many of the comments cited specific types of gases or gases produced by special and generally costly methods as appropriate fuels for exclusion from the natural gas definition and inclusion in the alternate fuels definition. Natural gas produced by secondary and tertiary methods and gas from "difficult to produce formations" are particularly suggested for exclusion. Natural gas from methane hydrate was also proposed for exclusion. One comment also recommended the exclusion from the natural gas definition of gases attributable to the user's working interest in a new well if the well (a) has an MEPR of 150 million Btu's per day or less, (b) is drilled on an offshore lease on the Outer Continental Shelf in which the water depth is in excess of 500 feet, and (c) the geological formation of which is deeper than 7,000 feet beneath the surface of the earth with an effective permeability of .05 millidarcies or less. This recommendation was made on the basis that, due to the high-risk, high-capital nature of this type of investment, the user-owners would not be able to afford to invest in 100% of the working interest in such wells. By excluding such gases from our natural gas definition, it is asserted that we would be encouraging resource development for the benefit of the public.

We are not convinced, for purposes of this Interim Rule, that we should exclude by rule the above-mentioned gases from the definition of "natural gas" under FUA. In the case of gas from secondary and tertiary recovery, we neither believe that gas obtained from such methods of recovery are commercially unmarketable nor that, under the language of the statute, we are free to designate the resulting production of such methods as something other than "natural gas" for use in implementing FUA. As for gas from "difficult to produce formations," we have concluded that it would be impractical and probably impossible to determine satisfactory generic criteria to define this term for this Interim Rule and to make exclusions from the natural gas definition by rule based on reasonable criteria. In regard to all of the gases mentioned in the paragraph above as well as any other gases not specifically excluded from the definition of "natural

gas" under these Interim Rules, three possibilities exist. First, if FERC were to designate one of these gases as a "high-cost natural gas" under Section 107(c)(5) of NGPA, we will accord it presumptive recognition as a commercially unmarketable gas, subject to our reserved right to review. Second, a user may claim, under § 507.3(b) of this Interim Rule, that his gas is commercially unmarketable and ERA will examine and determine the nature of the gas on a case-by-case basis under general criteria which we will promulgate in the near future. Finally, in the absence of either of these actions, we will treat such gases as being within the natural gas definition of this Interim Rule.

The comments in some instances recommended that synthetic gas derived from coal be excluded from our definition of natural gas. We note that the definition of coal in Section 103(a)(5) of FUA includes any fuel derivative of coal. Furthermore, low Btu synthetic gas derived from coal is expressly excluded from the natural gas definition by Section 103(a)(3)(B)(iv) of the Act, while all synthetic gas derived from alternate fuels and mixed with natural gas may also be treated as an alternate fuel upon certification (with supporting documentation) to us of the existence of the circumstances outlined in Section 103(b) of the Act (Special Rules Relating to Definitions of Natural Gas and Alternate Fuel).

The comments frequently recommended that, in order to provide users with a degree of certainty, we should recognize gas from a well once classified as commercially unmarketable to be permanently commercially unmarketable and, as such, not at all subject to the prohibitions of FUA. We concur with this view insofar as the suggested permanent designation would be an incentive to the production of certain currently unmarketable "high-cost gases," for example, coal seam and geopressurized methanes. Consequently, we will permanently exclude from the definition of "natural gas" all gases expressly designated in this Interim Rule as "high-cost gas" from wells spudded prior to 1990 and occluded gas from coal seams. In unusual cases (e.g. remote areas) where conventional natural gas wells have been drilled but there is no economically available pipeline system (or other solution) for the marketing of the produced gas to the general gas market, we will permit its consumption by a powerplant or installation by recognizing it as commercially unmarketable. However, if and when the gas does become marketable to the general public, we will classify it as "natural gas" and thus subject to the prohibitions and priorities of FUA for the benefit of the nation's higher-priority users.

Certain comments took the position that Congress did not intend that we include other energy resources produced from a well, for example crude oil, in computing the MEPR of a natural gas well, but rather that we were to consider only the natural gas production in order to encourage the development of such natural gas by "self-help" users who would otherwise have to purchase the gas they use. We find, however, that the legislation in Section 103(a)(3)(B)(ii) addresses the term "maximum efficient-production rate" only in terms of Btu's from the well itself and does not confine the product to be considered in connection with the natural gas definition to any specific energy resource. We agree that the intent of this provision is to promote the development of "self-help" wells, the production from which can be used by the producer in lieu of purchased natural gas. However, as the MEPR (250 million Btu's per day) established in the Act as the upper limit to production of a well whose gas is excluded from the natural gas definition is considerably higher than the upper limits generally recognized as defining small or "stripper" wells, we do not believe that our consideration of all the fuel resources produced from the well in the MEPR will discourage such "self-help" efforts.

Petroleum Definition—§ 507.2(b) and § 507.4

In our November 17, 1978 Federal Register notice (43 FR 53976), we requested comments on the proposal that we exclude from the petroleum definition, waste by-products from a refinery operation if the refinery user could demonstrate that they were both commercially unmarketable and could be used elsewhere in the plant to replace natural gas or petroleum. In response to our proposal, the National Petroleum Refiners Association suggested that we categorize all waste gases, liquids, and solids from refinery or other petrochemical industrial operations as "commercially unmarketable" because consumption within the refinery or industrial site constitutes the most efficient disposition of such energy sources. We called for comments on this particular proposal on January 29, 1979 (44 FR 5814).

After consideration of all the comments received, we have decided to modify our definition of "waste by-product" and our criteria for the determination of commercial unmarketability of a refinery waste by-product. These criteria appear in the interim regulations in § 507.4(e) and are described below.

For purposes of this subsection, a refinery waste by-product is a by-product that is unavoidably produced as the result of primary refinery processes. We will look not only at the by-product itself, but also at the ability of the by-product to be further processed or re-processed so as (1) to extract from it a component such as propane or butane that is of commercial quality or (2) to combine it with another waste by-product or other product to produce a blend of commercial quality.

Under the modifications to the "quality" criteria (§ 507.4(e)(1)) we now will designate as commercially unmarketable a refinery waste by-product (1) for which there are no expectations for use outside a refinery operation; (2) which is not a recognized item of commerce in a national market or in the regional or local area in which the facility is located; or (3) for which the cost of processing, storing, and distributing would not be covered by reasonably expected revenues from its sale.

Under the modifications to the "quantity" criteria (§ 507.4(e)(2)), we will designate as "commercially unmarketable" a refinery waste byproduct the quantities of which (1) are so insufficient or produced so sporadically as not to constitute an adequate and reliable supply to a potential buyer other than the producer; (2) are significantly less than those quantities normally sold or traded in the appropriate market, or (3) would require a cost of aggregating into commercial quantities and distributing that would not be covered by reasonably expected revenues from its sale.

Certain comments received suggested that we specifically identify the waste by-products which we consider to be commercially unmarketable and include in such identification heavy residual oils, oils with a viscosity greater than 1000, catalytic cracking residual fuel, vacuum-flashed and solvent-extracted pitches, refinery waste by-products that do not meet commercial specifications, waste by-products not suited for use outside the plant, and waste by-products whose upgrading to commercial quality is too expensive due to special handling requirements necessitated by their toxicity or carcinogenicity. Whatever the ultimate classification of these fuels, we believe it preferrable to take a case-by-case approach in evaluating and

classifying these fuels using the criteria in § 507.4 (described above). This case-by-case approach is justified on the basis that a waste by-product is not commercially unmarketable in and of itself. Rather, it becomes so by virtue of the nature of the refinery process in which it is generated and the market (or lack thereof) that exists for it. Moreover, product-specific exclusions may change over time and would require elaborate technical definitions and descriptions. Furthermore, we believe that we will have adequate time for case-by-case assessments without prejudice or inconvenience to anyone as most of the refineries that we will be reviewing under the Act are "existing" facilities, subject to Title III of FUA. We are statutorily required to initiate proceedings leading to a prohibition against the use of these waste by-products by such facilities on, for the most part, a case-by-case basis. Thus, an existing refinery may continue with the unrestricted burning of its waste by-products as an energy source until it is prohibited from doing so as a result of our action. At the same time, the refineries which are "new" under FUA and, hence subject to the statutory prohibitions against the consumption of petroleum, will be so few that we expect to be able to deal both with the "new" and "existing" facilities using waste by-products in a timely fashion on a case-by-case basis.

As noted previously, the opinion was expressed that consumption of waste by-products within the refinery producing them is the most efficient use of these fuels and should, accordingly, be permitted. We certainly support the general principle of economic efficiency of fuels, wherever it is possible. Nonetheless, the primary emphasis of FUA is to promote the substitution of domestic alternate fuels for use in the place of natural gas and petroleum. Therefore, where natural gas and petroleum can be diverted to higher priority users by redistribution of available fuel sources in accordance with the provisions of FUA, we will mandate the necessary redistribution.

Some of the commenters proposed that we should either designate the waste by-products of new refineries "unmarketable" *per se* or not require any new refinery to market any greater percentage of its by-products than an existing refinery located in close proximity to it. We reject the first part of this proposal on the grounds that there are no factors which make the waste by-products of a new refinery inherently unmarketable. We also reject the second part of the proposal as unreasonable under the Act since the Act does not differentiate in its classification of fuels between those consumed in "new" refineries and those consumed in "existing" refineries.

One commenter also proposed that Alaska be excluded from being an area in which refinery by-products are marketable. We cannot accept this suggestion as we are unaware of any characteristics pertaining to Alaska that would support the issuance of a blanket exclusionary rule of this type. Rather, we would expect any special characteristics pertaining to commercial marketability of waste by-products produced by Alaska refineries to be site specific and appropriately assessible only in a case-by-case analysis. We note, in response to the commenter, that existing powerplants in Alaska were exempted from Section 301 by FUA's terms; however, there is no evidence in the legislation indicating that any other Alaskan facilities should be excluded.

Some of the commenters asked that we designate refinery waste by-products as "commercially unmarketable" in the rules and that this designation be permanent regardless of any increased demands for such products generated by the fact of their commercially unmarketable classification and the prohibitions of FUA. The commenter believed that the commercially unmarketable designation should not be subject to future change as the initial classification was seen as a potential incentive to refiners to increase their heavy crude operations in order to bring about the concomitant increase in the refinery waste by-product. If this increase should happen, so the argument goes, markets for these by-products might open up because of demand by powerplants and installations that would otherwise be forbidden by FUA to burn petroleum.

If we were to accept this position, we would be doing substantial violence to the intent of FUA, the primary purpose of which is to increase use of alternate fuels while, in the case of petroleum, to reduce its use and its importation. Obviously, the action urged would encourage the use of petroleum in order to produce petroleum-derived products to be burned in boilers or other combustors. Such a result is directly contrary to the purposes of FUA. This "commercially unmarketable" exclusion was not intended to encourage the development of petroleum-derived products which happen to be only marginally commercially marketable. We further note that, for a refiner to increase its run of stills to heavier oils in order to increase the amount of the by-product and develop a market for such by-product, the result may be that he produces less lighter products, which we do not believe is desirable given the economics of production of both fuels.

The comments noted that in establishing the economic test for commercial unmarketability of a refinery by-product, we limited our criterion to whether the producer can obtain a price for the fuel which merely meets the costs of production and distribution. It was recommended that the criterion should be modified to take into account the cost of any necessary reprocessing of the by-product as well as a recompensation factor to cover the producer for the loss of the base in-plant fuel value. We intend that only the cost of any necessary reprocessing of the by-products to bring them up to commercial quality as well as storage and distribution costs be included in the cost of producing the fuels as we believe that the fixed production cost for an unavoidable by-product is properly viewed as zero. The interim regulations reflect this view (§ 507.4(e)). We will not, however, consider any recompensation of the producer for the loss of the waste by-product fuel due to its classification as petroleum.

Some of the comments raised the issue of whether a refinery waste by-product could not be commercially unmarketable by reason of quantity due to an overabundance of production, rather than insufficient or sporadic production. Heavy residual fuel oil refined from California and Alaskan North Slope crude oil in West Coast refineries was cited in the comments as an example of such an over-abundant waste by-product. In our discussion of the classification of heavy crude oils under the alternate fuels definition section of this Preamble, we explained why the heavy crudes must be considered "petroleum" within the FUA definition. Consequently, we are considering the heavy residual waste by-products coming from their refining to be petroleum. As for commercial unmarketability, the fact that there is a temporary excess of supply is perfectly consistent with commercial marketability. These are, in fact, well established items of commerce. No claims are made that these waste by-products are not of commercial quality or that there is no regular market for them. Rather, it is recognized that there is a market for these waste by-products, but that they are periodically unsalable due to a temporary excess. We do not believe that, in carrying out the FUA program, we should attempt to alleviate any temporary market situation by

excluding such petroleum waste by-products from the petroleum definition (and thereby making them alternate fuels).

III. Procedural matters

A regulatory analysis of this interim rule set forth below, as contemplated by Executive Order No. 12044, is contained within the draft regulatory analysis of the regulation regarding new facilities proposed on November 9, 1978, 43 FR 53974. A final Environmental Impact Statement (FEIS) has been prepared pursuant to the National Environmental Policy Act (NEPA). Both the draft regulatory analysis and the FEIS may be obtained from ERA, 2000 M St., N.W., Room B110, Washington, D.C. 20461, (202) 634–2170.

This interim rule and FUA become effective on May 8, 1979. ERA believes that good cause exists to make this interim rule immediately effective in order that an exemption petitioner may file his petition.

These revised rules have been submitted to the Office of Management and Budget (OMB) for clearance under the provisions of the Federal Reports Act. Any compliance with the data collection provisions of these interim rules may require revisions of additions as a result of OMB's action.

(Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 et. seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289 (42 U.S.C. 8301 et seq.); E.O. 12009, 42 FR 4267)

In consideration of the foregoing, Parts 502, 503, 505, and 507, Subchapter E, "Alternate Fuels" of Chapter II, Title 10 of the Code of Federal Regulations as proposed on November 17, 1978 and January 29, 1979 are hereby revised and adopted effective May 8, 1979.

Issued in Washington, D.C., May 8, 1979.

David J. Bardin,

Administrator, Economic Regulatory Administration.

10 CFR Chapter II, Subchapter E, Parts 502, 503, 505 and 507 are hereby adopted as an interim rule.

Subchapter E—Alternate Fuels

PART 500—POLICY AND DEFINITIONS

Sec.

500.1 [Reserved]

500.2 Definitions—[Issued May 8, 1979 (44 FR 28538, May 15, 1979)]

PART 501—ADMINISTRATIVE PROCEDURES AND SANCTIONS

[Issued May 8, 1979 (44 FR 28538, May 15, 1979)]

PART 502—FUELS DECISION REPORT

Sec.

502.1 Purpose and scope.

502.2 General instructions.

502.3 Contents.

502.4 Introduction.

502.5 Fuels considered.

502.6 Alternative sites considered.

502.7 Evidence required for exemption requested.

502.8 Mixtures general requirement.

502.9 Alternate supply of electric power.

502.10 Fluidized bed combustion general requirement.

502.11 Petroleum and natural gas consumption.

502.12 Conservation measures.

502.13 Environmental impact analysis.

Authority: (Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 et seq); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289 (42 U.S.C. 8301 et seq); E.O. 12009, 42 FR 4267).

PART 502—FUELS DECISION REPORT

§ 502.1 Purpose and scope.

(a) If you petition for a temporary or permanent exemption from the prohibitions of this Title, you must, except for the exception specified in § 502.1(d), submit as part of your petition a Fuels Decision Report. The purpose of the Fuels Decision Report is to demonstrate your eligibility for one or more exemptions and to provide ERA with additional information necessary to carry out the purposes of the Fuel Use Act (FUA) and the National Environmental Policy Act (NEPA).

(b) Where the exemptions you are seeking turn on the economic, technical or legal infeasibility of burning an alternate fuel, your Fuels Decision Report should demonstrate your eligibility for one or more exemptions, including your good faith efforts to avoid using petroleum or natural gas. In such instances, your Fuels Decision Report provides you the opportunity to demonstrate the ingenuity and professional judgment you used in attempting to find an energy source other than petroleum or natural gas which can serve your needs. The Fuels Decision Report describes the preliminary design analysis performed to make your fuels decision.

(c) We have not stipulated which alternate fuels you must consider for those exemptions which require alternate fuel examination.[9] Selection of fuels must reflect your needs and supply opportunities, but you must address all alternate fuels which reasonably warrant your in-depth consideration. The prepetition conference described in § 502.2(a) provides the opportunity to discuss the scope and kinds of fuels you must address in your Fuels Decision Report. The kinds of fuel you might consider could range from coal to any fuel (or mixture, if appropriate) that is not petroleum or natural gas. We do require that you describe not only the fuels you analyzed in-depth, but those you rejected, and the reasons you chose not to consider them further. Your Fuels Decision Report reflects a decision tree, in which a variety of alternatives are examined, but only a few are analyzed in depth.

(d) When you are requesting an exemption that requires a fuel search, your Fuels Decision Report must demonstrate that you rigorously explored and objectively evaluated all reasonable alternatives to oil or gas. It must clearly and concisely describe the process and methodology you used to search for, analyze, and evaluate each fuel you closely examined including documentation of feasibility reports, experts and sources used. The evidence you provide in support of your evaluation of each fuel considered in depth must be sufficient to demonstrate that you qualify for one or more exemptions, and must meet the eligibility and evidentiary requirements pertaining to the appropriate specific exemptions covered by this Title.

(e) The kinds of information which must be included in your Fuels Decision Report will differ depending on the kind of exemption or the type of unit under consideration. The information required is outlined in the evidentiary requirements of Parts 503, 504, 505 and 506 of these regulations. The following chart gives a brief indication of the substantive Fuels Decision Report (FDR) requirement for each exemption. No fuel search is required for category 1, 2, 3 and 5 exemptions. An alternate fuel search is required for category 4 exemptions.

Category 1:

(a) Mandatory permanent exemptions which primarily involve certification requirements:

(1) Peakload (for new powerplants).

(2) Emergency purposes.[10]

(3) Retirement (existing units).

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[9] We plan to initiate rulemaking proceedings to identify and define alternate fuels which should generally be considered, including new technologies as they become available. Case-by-case definition of appropriate alternate fuels would be an appropriate subject for prepetition conferences under § 502.2(a) of these regulations.

[10] Pursuant to the Act, Part 501, Subpart M, provides for your actions in emergency when you have not previously obtained an emergency exemption.

(b) No Fuels Decision Report is required for these exemptions, although you must submit adequate information in your petition to demonstrate you would be eligible for an exemption and to meet other applicable requirements.

Category 2:

(a) Temporary exemptions to statutory prohibitions and to final prohibition orders and rules (except retirement exemption).

(b) These exemptions require the following chapters of the Fuels Decision Report:

(1) § 502.4 Introduction.

(2) § 502.7 Evidence Required for Exemption Requested.

(3) § 502.12 Conservation Measures.

Category 3:

(a) Permanent end-use exemptions to statutory prohibitions and to final prohibition orders and rules:

(1) Mixtures.

(2) Cogeneration.

(3) Scheduled equipment outages (less than 21 days per year).

(4) Reliability of Service (for new powerplants).

(5) Product or process requirements.

(6) Peakload (for existing powerplants).

(7) Powerplants with less than 250 MMBtu capacity.

(8) Use of LNG.

(9) International pipelines.

(b) These exemptions require the following chapters of the Fuel Decision Report:

(1) § 502.4 Introduction.

(2) § 502.7 Evidence Required for Exemption Requested.

(3) § 502.8 Mixtures General Requirement (required by statute except mixtures, peakload for existing powerplants, use of LNG and international pipelines exemptions).

(4) § 502.9 Alternate Supply of Electric Power (required by statute for new powerplants except cogeneration exemption).

(5) § 502.10 Fluidized Bed Combustion General Requirement (required by statute except mixtures, peakload for existing powerplants, use of LNG, and international pipelines exemptions) (applicable only if ERA has made finding).

(6) § 502.11 Petroleum and Natural Gas Consumption (except cogeneration exemption).

(7) § 502.12 Conservation Measures.

(8) § 502.13 Environmental Impact Analysis.

Category 4:

(a) Permanent general exemptions and certain discretionary exemptions to statutory prohibitions and to final prohibition orders and rules:

(1) Lack of alternate fuel for first 10 years of useful life.

(2) Lack of alternate fuel at a cost which does not substantially exceed.

(3) Site limitations.

(4) Environmental requirements.

(5) Lack of adequate capital.

(6) State or local requirements.

(7) Intermediate load.

(8) Scheduled equipment outages (more than 21 days per year).

(b) These exemptions require the following chapters of the Fuels Decision Report:

(1) § 502.4 Introduction.

(2) § 502.5 Fuels Considered.

(3) § 502.6 Alternative Sites Considered (for new powerplant exemptions except scheduled equipment outages).

(4) § 502.7 Evidence Required for Exemption Requested (one chapter for each exemption requested and, where applicable, for each exemption requested for an alternative site).

(5) § 502.8 Mixtures General Requirement (required by statute).

(6) § 502.9 Alternate Supply of Electric Power (required by statute for new powerplant exemptions plus state or local requirements and intermediate load exemptions for existing powerplants).

(7) § 502.10 Fluidized Bed Combustion General Requirement (required by statute).

(8) § 502.11 Petroleum and Natural Gas Consumption.

(9) § 502.12 Conservation Measures.

(10) § 502.13 Environmental Impact Analysis.

Category 5:

(a) Temporary or permanent exemption to a proposed prohibition order or rule.

(b) No Fuels Decision Report is required although you must submit adequate information to demonstrate you would be eligible for an exemption if the order or rule were finalized.

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§ 502.2 General instructions.

(a) *Prepetition conference.* (1) You may request an informal prepetition conference with ERA to clarify any questions you may have concerning your request for exemption, to discuss whether your Fuels Decision Report must contain all of the chapters and information required by this Part, or, when a fuel search is required, to consider which fuels in the opinion of the ERA staff warrant in-depth examination. Such a conference should be requested in accordance with § 501.2 of these regulations. We retain the right to waive some of the requirements for the contents of the Fuels Decision Report if we determine that the purposes of the Act are best achieved by doing so. The grounds upon which we might consider waiving certain requirements could include:

(i) The burden of meeting such requirements could be excessive for a small firm or for a new firm;

(ii) The burden of meeting such requirements could be excessive for a petitioner requesting a certain type of exemption; or

(iii) Other reasons as determined by ERA.

(2) After the prepetition conference, we will prepare a written memorandum of record identifying any requirements of the Fuels Decision Report which we agree to waive. We will mail a copy of the memorandum of record to you within 30 days of the prepetition conference. If you file a petition for exemption, you must include a copy of the memorandum of record in your Fuels Decision Report. We also reserve the right to request any additional information that may be necessary once you have filed your petition.

(b) *Writing and organization.* Prepare your Fuels Decision Report as follows:

(1) You should discuss impacts in proportion to their significance. There should only be a brief discussion of minor issues.

(2) Your Fuels Decision Report should be concise, and be no longer than necessary to comply with these regulations. It should express the results of professional engineering analysis. It should also convey those results in language that is understandable to the serious lay public.

(c) *Incorporation by reference.* You may incorporate into your Fuels Decision Report by reference when to do so will cut down on the bulk without impeding agency and public review of the Report. You must cite the incorporated material in the Report and briefly describe its content. Whenever you are citing material contained in the appropriate forms you have filed, you must indicate the name of the form, its date, and the page and section number that contains the material cited. You may not incorporate any material by reference unless it is submitted with

your petition or has been submitted previously to DOE. If it has been previously submitted to DOE, you must identify the office to which it was submitted. You may not incorporate by reference any material based on proprietary data which is itself not available for review and comment.

(d) *Relationship between Fuels Decision Report and forms.* In most cases, the Fuels Decision Report and the appropriate forms will constitute your petition for exemption. Your Fuels Decision Report will contain the analysis, evidence, and documentation required to support your request for exemption. The forms will contain summary data and quantitative information which will be used to screen your petition for eligibility, adequacy and accuracy, and to ensure that you provide the detailed information needed for analysis. The forms you submit must reference the appropriate chapters and pages in your Fuels Decision Report where the explanation, justification, and back-up material supporting the information contained in the forms can be found. You may also reference the forms in your Fuels Decision Report, and incorporate them in your Report if appropriate.

§ 502.3 Contents.

Your Fuels Decision Report must contain:

(a) *Cover Sheet.* (1) The name of the petitioner.

(2) The name and location of the unit for which an exemption is being requested.

(3) The specific exemption(s) being requested.

(4) The name, address, and telephone number of the person who can supply further information.

The appropriate general form may be substituted for the cover sheet.

(b) *Table of contents.* Include a table of contents representing the contents as follows. Only include those chapters which are applicable to your exemption request(s).

Chapters

(i) Cover sheet (or general form).

(1) Introduction.

(2) Fuels Considered.

(3) Alternative Sites Considered.

(4) Evidence Required for Exemption(s) Requested (If more than one exemption is requested, subchapters could be included).

(5) Mixtures General Requirement.

(6) Alternate Source of Power General Requirement.

(7) Fluidized Bed Combustion General Requirement.

(8) Petroleum and Natural Gas Consumption.

(9) Conservation Measures.

(10) Environmental Impact Analysis.

(A–1) List of Preparers and Certifications.

(A–2) References.

(A–3) Appendices.

(c) *List of preparers and certifications.* (1) List the names, together with the qualifications and professional disciplines, of the principal contributors to the preparation of the Fuels Decision Report. Indicate the chapters or subject matters for which each principal contributor was responsible.

(2) Include a statement signed by your duly authorized representative that certifies that the principal contributors to the report have been informed that they may be questioned orally or in writing under oath in a public hearing concerning the portions of the Report for which they had responsibility.

(3) Briefly describe the process by which petitioner decided to seek an exemption, identify the persons and organizations primarily responsible for the decision and their reporting relationship within the corporation.

(d) *References.* (1) List the references which identify the reports, documents, experts, and other sources you consulted in compiling the Report. Cite these sources in accordance with acceptable documentation standards, including references to the part of the report to which they apply. If the source is unusual or little known, briefly describe its contents. Also, cite the documents enclosed as appendices and their relationships to the report.

(2) Identify at the end of each chapter of the Fuels Decision Report any information or any statement based in whole or in part on information or principles which, to your knowledge, represent significant innovations to or departures from generally accepted facts or principles.

(e) *Appendices.* Include in the appendices material which you believe substantiates any analyses fundamental to the Report, materials prepared in connection with the Report, and any other documents, studies or analyses which you believe are analytic and relevant to the decision to be made. Also include in the appendices copies of the forms you submit as part of your petition.

§ 502.4 Introduction.

This chapter is intended to give ERA a quick overview of your firm, what your firm does, and what the unit for which you are requesting an exemption is like. The purpose of this chapter is to provide a context for the remainder of the Report.

(a) Brief description of your corporation;

(b) Description of your operation at the facility under consideration; and

(c) Standard engineering description of the unit and the fuel you propose to burn in that unit, including:

(1) Description of the unit;

(2) Purpose of and need for the unit; and

(3) Operational requirements for the unit, including size (capacity, input and output in million Btu's per hour), output in terms of product or service to be supplied, and operating mode, including capacity factor, utilization factor, and fluctuations in the load.

§ 502.5 Fuels considered.

(a) If you are requesting a category 4 exemption, you must conduct a fuel search and include this chapter. The purpose of this chapter is to summarize the fuels you considered, to identify those you believed were worth considering in depth and those you rejected, and to describe briefly the reasons you rejected further consideration of certain fuels. You should request an exemption based upon your inability to use any fuel you did not reject, and prepare the chapter described in Section 502.7 for that exemption request.

(b) Identify and describe the alternate fuels and mixtures you considered. Also identify the fuel you would use if the exemption were granted. Briefly describe the types of fuels you considered, their fuel characteristics, types of units (boiler, combined cycle, etc.) and equipment needed for each fuel, quality and quantities of fuel, and other relevant considerations. Provide a clear and concise explanation of why you selected each fuel for consideration as well as a brief discussion of why you did not consider further any other alternate fuels.

§ 502.6 Alternative sites considered.

(a) If you are requesting a category 4 exemption for a new powerplant (except a scheduled equipment outage exemption), you must include this chapter in your Fuels Decision Report. The purpose of this chapter is to summarize the alternative sites you considered, to identify those you believed were worth examining in-depth and those you rejected, and to briefly describe the reason you rejected further consideration of certain sites.

(b) Identify and describe the alternative sites you examined and the

alternate fuel you considered for use at each site. Provide a clear and concise explanation of the approach and methodology you used for selecting and evaluating each site, in accordance with the evidentiary requirements set forth in § 503.11 of these regulations. Also briefly address the reasons you rejected consideration of other alternative sites.

§ 502.7 Evidence required for exemption requested.

(a) If you are requesting a category 2, 3, or 4 exemption, you must include this chapter (and appropriate subchapters if you desire) in your Fuels Decision Report. The purpose of this chapter is to set forth the evidence supporting the required showings you must meet for any exemption you request. You must prepare this chapter for each exemption you are requesting.

(b) If you are requesting a category 2 exemption, this chapter must include your compliance plan as well as the evidence required for the exemption.

(c) If you are requesting a category 3 exemption, this chapter must contain sufficient information to meet the evidentiary requirements set forth in the regulation pertaining to the specific exemption you are requesting.

(d) If you are requesting a category 4 exemption, you must conduct a fuel search and prepare this chapter for each alternate fuel you considered in-depth as a reasonable option, and which provides the basis for each exemption you are requesting. For example, if you determined that coal, low Btu gas derived from coal, and solar energy were reasonable alternatives, but that technical, legal, or economic constraints prevented you from using them and made you eligible for a permanent exemption, you would prepare Evidence Required for Exemption Requested chapters for each exemption you request. Each chapter would meet the evidentiary requirements set forth for the exemption being requested based upon the fuel addressed in that chapter. The remainder of the fuels you examined—those you determined did not warrant in-depth consideration or were not reasonable alternatives—would be addressed in the Fuels Considered chapter.

(e) If you are requesting a category 4 exemption for a new powerplant, (except a scheduled outage exemption), you must meet the alternative site requirement. To do so, you must conduct a fuel search and the alternative site search required in § 503.11 of those regulations. You must prepare Evidence Required for Exemption Requested chapters not only for any exemptions you request based on fuels you examined for your proposed site, but for any exemptions you may request based upon your inability to use alternate fuels at alternative sites.

§ 502.8 Mixtures general requirement.

If you are requesting a category 3 or 4 exemption, (except for the mixtures, peakload for existing powerplants, use of LNG or international pipelines exemptions), you must include this chapter in your Fuels Decision Report. In accordance with §§ 503.9, 504.14, 505.7, or 506.14, as appropriate, demonstrate that use of a mixture(s) is not economically or technically feasible. The mixture(s) you examine must be eligible for a mixtures exemption under whichever of §§ 503.38, 504.36, 505.28, or 506.36, that applies to the unit under consideration.

§ 502.9 Alternate supply of electric power.

If you are requesting a category 3 or 4 exemption for a new powerplant, (except for a cogeneration exemption), or a state or local requirement or intermediate load exemption for an existing powerplant, you must include this chapter in your Fuels Decision Report. In accordance with § 503.7 or § 504.13, as appropriate, of these regulations, demonstrate that despite reasonable good faith efforts, there is no alternate supply of electric power which is available within a reasonable distance at a reasonable cost without impairing short-run or long-run reliability of service. This showing must describe a diligent effort to reduce the need for the power from your proposed plant by implementing within your system whatever conservation measures are available and cost effective.

§ 502.10 Fluidized bed combustion general requirement.

If ERA has made a site-specific or generic finding that the use of a method of fluidized bed combustion of an alternate fuel is financially and technically feasible, and if you are requesting a category 3 or 4 exemption (except for a mixture, peakload for existing powerplants, use of LNG, or international pipelines exemption), you must include this chapter in your Fuels Decision Report. In accordance with §§ 503.10, 504.16, 505.8, or 506.16, as appropriate, demonstrate that the use of a method of fluidized bed combustion of an alternate fuel is not economically or technically feasible.

§ 502.11 Petroleum and natural gas consumption.

(a) If you are requesting a category 3 or 4 exemption (except cogeneration), you must complete this chapter. The purpose of this chapter is not to determine whether you are eligible for an exemption, but to provide information to ERA in carrying out the purposes of FUA. Among the ways ERA intends to use this information are development of terms and conditions for exemptions, development of terms and conditions and other ERA responses appropriate to national emergencies, establishment of aggregation jurisdiction, selection of candidates for prohibition rules and orders, and development of enforcement strategies.

(b) Identify your current and projected petroleum and/or natural gas consumption for the unit for which you are requesting an exemption, and for the facility at which the unit is located. Provide the following information:

(1) How many units do you have at the facility under consideration which burn petroleum or natural gas (including the unit for which the exemption is requested), what is their nameplate and net dependable capacity and current level of total annual fuel consumption?

(2) What are your retirement plans for your existing oil and gas units at the facility under consideration?

(3) What are your projected (through 1990) annual levels of consumption of petroleum and natural gas (by fuel type and barrel of Mcf per year) for the unit under consideration and for all existing oil and gas units at the site under consideration?

(c) Are any alternate fuels being consumed at the site? If so, identify the fuels, identify in what units the alternate fuels are being burned, and identify the quantities of alternate fuels being used.

(d) If you are requesting an exemption which would allow you to use petroleum, identify the minimum amount of oil you would need for the unit under consideration in the event of a national emergency, such as a foreign supply interruption, which results in the reimposition of petroleum allocation controls. Also identify your plans and alternate courses of action during a national emergency if you were to be prohibited from using oil in that unit during such an emergency. For both the unit under consideration and the facility at which it is located, describe your fuel switching plans and capabilities.

§ 502.12 Conservation measures.

(a) If you are requesting a category 2, 3, or 4 exemption, you must include this chapter in your Fuels Decision Report. The purpose of this chapter is to provide us with sufficient information to assist us to identify any conservation measures which should be included in

the terms and conditions we may impose if we grant you an exemption.

(b) Identify, describe and document any conservation measures you have taken or intend to take to minimize the use of oil or gas if this exemption is granted. Outline the conservation measures you intend to take, and the conservation goals you have set for yourself, for the unit under consideration, and for the facility at which the unit is or will be located. Conservation measures entail either reduction in consumption of oil and gas or increased efficiency in the utilization of oil and gas. Such measures can range from housekeeping measures to replacement of inefficient units. Such measures also could include the use of mixtures of gas or oil and alternate fuels, and new more efficient technologies. Your description of the measures you intend to use should be detailed and should include comparative consumption figures, identification of conservation equipment or techniques, proposed manner of use, proposed date of use, cost, and expected benefits and problems.

§ 502.13 Environmental impact analysis.

(a) In order to aid us in fulfilling our responsibilities under the National Environmental Policy Act (NEPA), you must include this chapter in your Fuels Decision Report if you are requesting an exemption which the Act did not exempt from compliance with NEPA. The exemptions subject to NEPA are all permanent exemptions for new powerplants or installations, and permanent exemptions from a statutory prohibition or a final prohibition rule or order for existing powerplants or installations relating to cogeneration, scheduled equipment outages, state or local requirements, or intermediate load powerplants. Material which has been prepared pursuant to any Federal, state or local requirement for environmental information for this unit or site may be incorporated by reference in this chapter and appended to the Fuels Decision Report.

(b) ERA has issued proposed detailed guidelines for environmental reports which should be used to prepare this Environmental Impacts Analysis chapter. They, and any revisions thereto, will be available in the ERA Public Document Room. These guidelines are subject to discussion and waiver at a pre-petition conference. In general, this chapter must contain the following:

(1) A description of the Federal, state and local requirements including air emission, water discharge, and waste disposal limitations which you must meet for each fuel considered;

(2) An identification of the equipment and facilities needed to meet the environmental requirements for each fuel considered;

(3) A clear and concise description of the existing site, and, in the case of new powerplants, alternative site(s) environments which may be affected by the grant or denial or your petition for exemption, including any pertinent summary technical data, maps, and diagrams;

(4) A detailed description of the probable environmental impacts resulting from the grant or denial of your petition, including direct and indirect impacts (including indirect increases or decreases in oil consumption attributable to the grant of your petition), and beneficial and negative impacts; and

(5) A discussion of how the grant or denial of your exemption would conform to or conflict with any existing or proposed Federal, state or local land use plans, policies or controls.

PART 503—NEW ELECTRIC POWERPLANTS

Subpart A—Statutory Prohibitions

Sec.

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Subpart B—General Requirements for Exemptions

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Authority: (Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 et seq); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289 (42 U.S.C. 8301 et seq); E.O. 12009, 42 FR 4267).

PART 503—NEW ELECTRIC POWERPLANTS

Subpart A—Statutory Prohibitions

§ 503.1 Purpose and scope.

This subpart sets forth the statutory prohibitions imposed by the Act upon new electric powerplants. The prohibitions set forth in this subpart apply to all new electric powerplants, as defined in § 500.2 unless an exemption has been granted by ERA under Subparts C and D of this Part. Any person who owns, controls, rents, or leases a powerplant is subject to the prohibitions imposed and the sanctions provided for by the Act or these prohibitions.

§ 503.2 Statutory prohibitions.

(a) Section 201 of the Act prohibits, unless an exemption has been granted under Subparts C or D of this Part, the following:

(1) The use of petroleum or natural gas as a primary energy source in any new electric powerplant; and

(2) The construction of any new powerplant without the capability to use an alternate fuel as a primary energy source.

(b) For purposes of this prohibition, construction with the capability to use an alternate fuel means that the powerplant to be constructed must be able to use, in compliance with applicable environmental requirements, an alternate fuel as the primary energy source at the time it becomes operational or at the expiration of a temporary exemption (see Definitions, § 500.2).

Subpart B—General Requirements for Exemptions

§ 503.3 Purpose and scope.

This subpart establishes the general requirements necessary to qualify for either a temporary or permanent exemption under this Part and sets out the methodology for calculating the cost of using an alternate fuel and the cost of using imported petroleum.

§ 503.4 Fuels decision report.

(a) Before ERA will accept a petition for either a temporary or permanent exemption under this Part, you must include as part of your petition a Fuels Decision Report as described in Part 502, unless you are requesting a peakload or emergency purposes exemption. The Fuels Decision Report shall contain the analysis and documentation of the evidence required in support of your exemption request.

(b) Your petition may contain more than one exemption request. In this case, your petition would include one Fuels Decision Report which addresses your considerations and the appropriate forms for the exemptions you are requesting.

§ 503.5 Cost calculations for new powerplants.

(a) *General.* (1) This calculation compares the cost of using alternate fuel to the cost of using imported petroleum. Its purpose is to provide ERA with a mechanism for deciding when noneconomic investments are acceptable in the best interests of the United States.

(2) The cost of using an alternate fuel in lieu of imported petroleum as a primary energy source will be deemed to be substantially in excess of the cost to use imported petroleum where the ration of the former to the latter is greater than the index set periodically by ERA.

(3) The index is currently 1.3. ERA will revise the index from time to time after public notice and an opportunity to comment. Revisions shall become effective for all ERA decisions after final publication; however, the relevant index for a specific petition will be the index in effect at the time the petition is submitted, or the index in effect at the time a decision is rendered, whichever is lower.

(4) The cost test takes into consideration cash outlays for capital investments and annual expenses, and the effect of depreciation and taxes on cash flow. There are two comparative cost tests—a general cost test and a special cost test. You must demonstrate eligibility for a permanent exemption using the procedures specified in the general cost test (paragraph (b)). You must demonstrate eligibility for a temporary exemption using the procedures specified in the general cost test (paragraph(b)) or the special cost test (paragraph(c)).

(5) The general cost test differs from the special cost test with respect to the time period over which costs are calculated and the types of fuel consuming equipment being considered. When using the general cost test, the cost must be computed for the useful life of the powerplant. When using the special cost test, the cost is computed only for the term of the exemption. In the general cost test, the proposed oil or natural gas powerplant consuming oil or natural gas is compared with an alternate fuel-capable powerplant of the same capacity consuming that alternate fuel. In the special cost test, an alternate fuel-capable powerplant consuming oil or natural gas is compared with an alternate fuel-capable powerplant consuming that alternate fuel.

(b) *Cost calculation—general cost test.* (1) You may be eligible for a permanent exemption if you demonstrate that the cost of using an alternate fuel starting with each successive year within the first 10 years of operation will always substantially exceed the cost of using imported petroleum over the useful life of the powerplant. You will have to show that the cost of using an alternate fuel, starting in each of the first 10 years of operation and using oil or natural gas until the start of using an alternate fuel, substantially exceeds the cost of using only imported petroleum.

(2) ERA will not grant a permanent exemption if a temporary exemption is warranted. Therefore, if the cost computed with successive starting dates for alternate fuel use (for the first 10 years of operation) does not always substantially exceed the cost of using imported petroleum, you would only be eligible for a temporary exemption. The length of the temporary exemption would be for a minimum period where the cost of starting to use alternate fuel always substantially exceeds the cost of using imported petroleum. For example, if you plan to burn coal and it cannot be obtained at a reasonable price for 2 years after the installation of the powerplant designed to burn coal and oil, DOE may grant a temporary exemption and allow the burning of oil for 2 years.

(3) To conduct the test, you must use the equations that follow.

(i) Calculate the ratio (R) of the cost of using an alternate fuel to the cost of using imported petroleum with equation 1.

$$\text{EQ 1} \qquad R = \frac{\text{COST (ALTERNATE)}}{\text{COST (OIL)}}$$

(ii) Calculate the cost of using an alternate fuel and imported petroleum with equation 2.

$$\text{EQ 2} \qquad \text{COST} = 1 + \sum_{i=1}^{N} \frac{(OM_i + FL_i)(1 - t) - t^* DPR_i}{(1 + K)^i}$$

(iii) Calculate the capital investment using equation 3.

$$\text{EQ 3} \qquad I = \sum_{i=-g}^{N} \frac{I_i - ITC_i - S_i}{(1 + K)^i}$$

(4) The terms in equations 2 and 3 are defined as follows:

i=Year. Outlays before the plant becomes operational are future valued to the year before the plant becomes operational (year 0) and outlays after the plant becomes operational are present valued to the year before the plant becomes operational.

g=The number of years prior to the year before the plant becomes operational a cash outlay is made for capital investments or investment tax credit is used.

N=The useful life of the powerplant (see section d).

I_i=Yearly cash outlay (in dollars) from the year outlays first occur to the last year of the plant's useful life for capital investments. See section (d) for the equipment which must be included.

OM_i=Annual cash outlay in year i (in dollars) for all operations and maintenance expenses except fuel (i.e., all non-capital and non-fuel cash outlays caused by putting the capital investments into service). May include labor, materials, insurance, taxes (except income taxes), etc. (See section d.)

S_i=Salvage value of capital investment (in dollars) in year i.

FL_i=Annual cash outlay for delivered fuel expenses (in dollars) in year i (see section d).

K=The discount rate expressed as a fraction (see section d).

ITC_i=Federal investment tax credit resulting from capital investments, used in year i (see section d).

DPR_i=Depreciation in year i (see section d).

t=Marginal income tax rate (see section d).

(5) Fuel transportation expenses are part of delivered fuel expenses except where you must acquire capital equipment to deliver the fuel. The cash outlays for this equipment are included in the capital outlay terms. Similarly, the expense of delivering power to your service area must be included as an annual cash outlay unless you must construct transmission facilities, in which case you must include these outlays in the capital outlay term.

(6) The step-by-step procedure that follows shows the comparison that you must make. It outlines the equipment and fuel comparisons, as well as the time comparisons.

(i) Compute the cost (COST) of using an alternate fuel in an alternate fuel-capable powerplant throughout the useful life of the powerplant with equation 2.

(ii) Compute the cost (COST) of using oil or natural gas in an oil or natural gas-fired powerplant throughout the useful life of the powerplant with equation 2.

(iii) Compute the ratio (R) of the cost of using an alternate fuel throughout the useful life of the powerplant to the cost of using oil or natural gas throughout the useful life of the powerplant with equation 1. If the ratio (R) is equal to or less than 1.3. the index set by ERA, you are not eligible for a permanent or temporary exemption using the general cost test and need not complete the remainder of the calculation.

(iv) Compute the cost (COST) of using an alternate fuel in an alternate fuel and oil or natural gas-capable powerplant with equation 2 assuming an alternate fuel is not used as the primary energy source until the end of the first year of operation and that oil or natural gas is used for the first year of operation. All cash outlays should reflect postponed use of alternate fuel (e.g., installation of scrubber when used).

(v) Successively compute the cost (COST) of using an alternate fuel in an alternate fuel and oil or natural gas-capable powerplant with equation 2 assuming alternate fuel is postponed until the end of the second through tenth year of operation (and oil or natural gas is used in the years preceding alternate fuel use).

(vi) Compute the ratios (R) of the cost of using an alternate fuel successively at the end of the first through tenth year to the cost of using oil or natural gas throughout the life of the powerplant with equation 1.

(vii) If all the ratios (R) computed in C and F are greater than 1.3 (an index to be set periodically by ERA), your proposed powerplant would meet the cost criteria for a permanent exemption. If one or more or the ratios (R) is equal to or less than 1.3 and a series of ratios (R), starting with the case where alternate fuel is used from the start of operation, are all greater than *1.3*, a temporary exemption would be granted for the minimum period in which the cost of starting to use alternate fuel, deferred year by year, always exceeds *1.3*.

(7) The following table shows the hypothetical results of four sets of calculations, assuming the index set by ERA is *1.3*.

Hypothetical Results of Four Sets of Calculations

Year in which alternate fuel use is commenced	Case I	Case II	Case III	Case IV
At start of operation:				
1	1.4	1.6	1.5	1.1
2	1.5	1.7	1.5	1.2
3	1.3	1.5	1.4	1.2
4	1.3	1.5	1.3	1.1
5	1.2	1.5	1.4	1.1
6	1.2	1.4	1.4	1.1
7	1.1	1.4	1.5	1.1
8	1.1	1.4	1.5	1.1
9	1.0	1.4	1.6	1.1
10	1.0	1.4	1.6	1.1

The results of the above table shows that: a 2-year temporary exemption would be granted in Case I, a permanent exemption would be granted in Case II, a 3-year temporary exemption would be granted in Case III, and no exemption would be granted in Case IV.

(c) *Cost calculations—special cost test.* (1) You may be eligible for a temporary exemption if you demonstrate that the cost of using an alternate fuel in an alternate fuel-capable powerplant will substantially exceed the cost of using oil or natural gas in an alternate fuel-capable powerplant over the period of the proposed exemption. The period of the exemption cannot exceed 10 years. You will have to show that the cost of using an alternate fuel substantially exceeds the cost of using imported petroleum for the first year of operation, the first 2 years of operation, and successive first years of operation, up to the period of the proposed exemption. To do so, you must perform the calculations with successive ending dates to determine the maximum length of the exemption. ERA will limit the duration of a temporary exemption to the shortest time possible.

(2) To conduct the test, you must use the equations that follow.

(i) Calculate the ratio (R) of the cost of using an alternate fuel to the cost of using imported petroleum with equation 4.

EQ 4 $$R = \frac{\text{COST (ALTERNATE)}}{\text{COST (OIL)}}$$

(ii) Calculate the cost using equation 5.

EQ 5

$$COST = 1 \times \frac{\sum_{i=1}^{P} (1+k)^{-i}}{\sum_{i=1}^{n} (1+k)^{-i}} + \sum_{i=1}^{P} \frac{(OM_i + FL_i)(1-t) - t \cdot DPR_i}{(1+k)^i}$$

(3) The terms in equation 5 are the same as in equation 2 above with the addition of: P=The length of the proposed temporary exemption.

(4) The step-by-step procedure that follows shows the comparisons you must make.

(i) Compute the cost (COST) of using an alternate fuel in an alternate fuel-capable powerplant assuming the length of the proposed exemption as 1 year with equation 5.

(ii) Compute the cost (COST) of using oil or natural gas in an alternate fuel and oil or natural gas-capable powerplant assuming the length of the proposed exemption is 1 year with equation 5.

(iii) Compute the ratio (R) of the cost of using an alternate fuel for the first year to the cost of using imported petroleum for the first year with equation 4.

(iv) Repeat the calculations made in A, B, and C above assuming the length of the proposed exemption is 2 years, 3 years, 4 years, and so on, up to the period of the proposed exemption.

(v) A temporary exemption would be granted when all the ratios (R) are greater than 1.3 (the index established by ERA).

(d) *Information on parameters used in the calculation.* (1) All estimated expenditures, except natural gas, and petroleum products, shall be expressed in real (uninflated) terms by using the prices in effect at the time the petition is submitted.

(2) The delivered price of oil or natural gas used in the calculation of delivered fuel expenses must reflect the price of imported oil.

(i) If you plan to use 100 percent domestic [11] petroleum product in your facility, compute your petroleum product price with the following equation:

PFE=PF+PICO−PCCO

where:

PICO=Price of imported crude oil. The most recent refiner acquisition cost of imported crude oil as reported in the **Federal Register** monthly notice for the DOE Domestic Crude Oil Allocation (Entitlements) Program.

PCCO=Price of composite crude oil. The most recent weighted average cost of total reported crude oil receipts as reported in the **Federal Register** notice for the DOE Entitlements Programs.

PF=Price of your fuel (f.o.b. your facility). The most recent actual weighted average cost of your fuel (other than natural gas). Alternatively, if no purchases of fuel oil occurred, or you used natural gas during that month, you should use a simple average of the industrial price of fuel oil (capable of being burned in your facility) sold in your area by at least three suppliers.

PFE=Price of fuel for use in the cost calculation.

(ii) If you plan to use 100 percent imported petroleum product in your facility, compute your petroleum price with the following equation:

PFE=PF+ENT

Where:

ENT=½ × E_p × DOSR. For residual fuel oil if an entitlement has been received by the importer.

ENT=0. For all other products or if an entitlement has not been received by the importer.

e_p=Entitlement price reported in the **Federal Register** monthly notice for the DOE Entitlements Program.

DOSR=National domestic oil supply ratio reported in the **Federal Register** monthly notice for the DOE Entitlements Program.

(iii) If you plan to use a combination of domestic and imported petroleum product in your facility, you may use the price computed with the formula in (d)(2)(i) of this section or you may use a weighted average of the prices computed with the formulas in (d)(2)(i) and (ii) of this section.

(iv) If you plan to use natural gas in your facility, you must use the formula in (d)(2)(i) of this section and the price of No. 6 residual fuel oil, which meets the air quality standards in your area, as the price of fuel.

(3) Capital investments (I) must include all items which are capital investments for Federal income tax purposes. All purchased equipment which has a useful life greater than 1 year, capitalized engineering costs, land, construction, environmental offsets, fuel inventory, [12] transmission facilities, etc., that are required to be able to use the powerplant must be included. However, an item may only be included if a cash outlay is required after the decision has been made to build the powerplant. [13]

(4)(i) The operations and maintenance expenses (OM_i) and the fuel expenses (FL_i) can be computed by either of two methods, however, the one chosen must be consistently applied throughout the analysis: (A) assume an annual capacity factor of 70 percent of design capacity for the life of the plant and compute cash outlays for operations and maintenance expenses and fuel expenses on a single powerplant basis; or (B) determine the incremental increase in cash outlays for operations and maintenance expenses and fuel expenses that would occur in your region by the addition of the powerplant. The incremental increases will be computed by economically dispatching all powerplants in the region. The regional incremental increases in cash outlays would then be the operations and maintenance expenses and fuel expenses for the purposes of the cost calculation. The petitioner may economically dispatch the region for either the entire life of the powerplant and use each year's incremental increase or economically dispatch the region for the first 10 years of operation and use the average of those 10 incremental increases. The region must be your electrical region unless you can show such integrated operation is unlikely to be achieved

[11] For the purposes of the regulation, the Virgin Islands, Puerto Rico, and the U.S. Territories and possessions are domestic sources.

[12] The following fuel supplies must be included: (a) all powerplants with only steam driven turbines—78 days, (b) all powerplants with only combustion turbines—162 days, and (c) all powerplants with combined cycles—both steam driven turbines and combustion turbines—162 days.

[13] E.g., if in 1982 you are filing for an exemption to use petroleum in a (statutorily) new powerplant which became operational in 1981, you must include all the cash you have already disbursed as well as the cash you will disburse.

midway through the useful life of the powerplant and you can propose an acceptable alternative.

(ii) If you use the first methodology, the operations and maintenance expenses must include both the fixed and variable components.

(iii) If you use the second methodology, you will have to certify, subject to penalties, that the proposed plant will not use more oil than you showed it would use in the dispatch analysis.

(5) The discount rate (K) is 2.9 percent. ERA will change the discount rate from time to time after public notice and an opportunity to comment. Revisions shall become effective after final publication; however, the relevant discount rate for a specific petition will be the discount rate in effect at the time the petition is submitted.

(6)(i) The useful life (N) of a coal, oil or natural gas-fired powerplant will be 35 years. The useful life of a nuclear powerplant will be 40 years. The useful life of other alternate fuel powerplants shall be presumed to be 35 years. You may rebut this presumption with suitable engineering evidence.

(ii) If the powerplants being compared have different useful lives, you will have to modify your general cost test calculation so that the two cash flows being compared have the length of the longer useful life. To do this, you must multiply the cost—computed with equation 2—of the facility with the shorter life by the following adjustment factor (A):

$$A = \frac{\sum_{i=1}^{O} (1+k)^{-i}}{\sum_{i=1}^{M} (1+k)^{-i}}$$

where:

M = The useful life of the facility with the shorter life,

O = The useful life of the facility with the longer life, and

K = The discount rate.

(7) All Federal investment tax credit (ITC) will be applied consistently throughout the analysis in a manner consistent with Federal tax laws in effect at the time the petition is submitted.

(8) Depreciation (DPR) will be applied consistently throughout the analysis in a manner consistent with the Federal tax laws in effect at the time the petition is submitted. In general, accelerated depreciation cannot be used for gas- or oil-fired boilers. For alternate fuel fired facilities, you must use the most rapid depreciation permitted by law.

(9) The marginal income tax rate (t) is the firm's marginal Federal income tax rate for the year the petition is submitted.

(10) The design capacity of the plants being compared must be the same.

(11) All estimated cash outlays will be computed in accordance with generally accepted accounting principles.

(e) *Evidence in support of the comparative cost test.* All petitions for exemption requiring the use of the comparative cost test shall include, but not be limited to, the following information:

(1) A detailed accounting of all cash outlays, investment tax credits, and anticipated salvage for capital investments. Include a description and cost estimate of all major construction and equipment. All critical assumptions should be stated and sufficient data should be included to support your estimates.

(2) A detailed accounting of all annual cash outlays for fixed and variable operations and maintenance expenses including a description of all major elements and the formulas used to compute them. All critical assumptions should be stated and sufficient data included to support your estimates.

(3) A detailed accounting of all annual cash outlays for delivered fuel expenses including the formulas used to compute them. All critical assumptions should be stated and sufficient data included to support your estimates. The fuel price and characteristics for each alternate fuel should be included.

(4) If the useful life of the new alternate fuel—other than coal or nuclear—powerplant is judged to be less than 35 years, all critical assumptions and sufficient data to support that position.

(5) A detailed accounting of the depreciation for each capital asset, including the depreciable base, tax life, and methods used. All critical assumptions should be stated and sufficient data submitted to support your estimates.

(f) *Example of calculations.* (1) The purpose of this example is solely to illustrate the mechanics of the cost tests; it should not be construed to be guidance on the application of the Federal income tax laws. The detail is only to the level of the individual terms in the cost test equations. Where the petitioner should supply a value, equations and data, we have only supplied the value.

(2) We are assuming: (i) that you are profitable to the extent that your Federal marginal income tax rate is 46 percent and that you need not carry over investment tax credits, and (ii) that you use double declining balance switching over to straight line to depreciate alternate fuel fired facilities.

(3) You are planning to build a new powerplant and the fuels you are considering are coal and oil. In this particular situation, the delivery cost of coal is much greater for the first 3 years than it will be in the later years because of a transportation problem requiring 3 years to resolve. Do you qualify for an exemption? If so, is it permanent or temporary?

(4) To determine if you qualify for a permanent exemption, you would have to use the general cost test and compute the ratios of the cost to use (i) coal for the useful life of a coal capable powerplant, (ii) oil for the first year and coal for the remainder of the useful life of a coal and oil capable powerplant, (iii) oil for the first 2 years and coal for the remainder of the useful life of a coal and oil capable powerplant * * *, and (xi) oil for the first 10 years and coal for the remainder of the useful life of a coal and oil capable powerplant to the cost of using oil for the entire life of an oil-fired powerplant.

(5) All 11 ratios would have to be higher than 1.3, which is the index for the purposes of this example, in order to qualify for a permanent exemption. However, if a series of successive ratios, starting with the case where alternate fuel is used from the start of operation, are all greater than 1.3, you would be eligible for a temporary exemption up to the last year the ratio is greater than 1.3.

(6) In this example, we will only compute the ratios of (i) the cost to use coal for the useful life of a coal capable powerplant and (ii) the cost to use oil for the first 3 years and coal for the remainder of the useful life of a coal and oil capable powerplant to the cost of using oil for the entire useful life of an oil fired plant.

(7) To determine if you qualify for a temporary exemption, if you have not already done so with the General Cost Test, of 3 years, you would have to use the Special Cost Test and compute the ratios of the cost to use coal in a coal

capable powerplant to the cost to use oil in a coal and oil capable powerplant for 1, 2, and 3 years. All three ratios would have to be higher than *1.3* in order to qualify for a 3-year temporary exemption. In this example, we will only compute the ratio of the cost to use coal in a coal capable powerplant to the cost to use oil in a coal and oil capable powerplant for 3 years.

(8) *Parameters.* A set of hypothetical parameters are given below.

(i) 500 MW coal-fired powerplant—

(A) *Captial cash flow requirements.*

Year before powerplant becomes operational:	*Cash flow*
−5	$19,416,000
−4	38,832,000
−3	97,079,000
−2	116,500,000
−1	77,663,000
0	38,832,000
Total	371,700,000

(B) *Operations and maintenance expense cash requirements.*

	Year
Fixed	$1,433,000
Variable	14,452,000
Total	15,885,000

(C) *Fuel expense cash requirements.*

	Years
First 3 years	$56,033,000
Fourth year through 35th year	37,355,000

(D) The plant is assumed to have a salvage value of zero.

(ii) 500 MW oil-fired powerplant—

(A) *Capital cash flow requirement.*

Year before powerplant becomes operational:	*Cash flow*
−4	$11,287,000
−3	22,574,000
−2	56,435,000
−1	79,009,000
0	56,435,000
Total	225,740,000

(B) *Operations and maintenance expense cash requirements.*

	Year
Fixed	$1,046,000
Variable	1,042,000
Total	2,090,000

(C) *Fuel expense cash requirements.*

	Year
First through 35th year	$93,020,000

(D) The plant is assumed to have a salvage value of zero.

(iii) 500 MW oil- and coal-fired powerplant—

(A) *Capital cash flow requirements.*

(*1*) The cash flows required to build the basic plant and make it oil capable are:

Year before powerplant becomes operational:	Cash flow
−5	$19,416,000
−4	50,119,000
−3	91,079,000
−2	116,500,000
−1	60,440,000
0	43,170,000
Total	386,730,000

(*2*) The additional cash flows required to make the plant coal capable are:

Years before powerplant becomes coal capable:	*Cash flow*
−1	$49,927,000
0	24,963,000
Total	74,890,000

(B) *Operations and maintenance expense cash requirements.*

(*1*) When burning oil:

	Year
Fixed	$1,048,000
Variable	1,042,000
Total	2,090,000

(*2*) When burning coal:

	Year
Fixed	$1,433,000
Variable	14,452,000
Total	15,885,000

(C) *Fuel expense cash requirements.*

$$I = \sum_{i=-5}^{0} \frac{I_i - ITC_i - S_i}{(1+K)^i}$$

$$= \frac{19,416}{(1.03)^{-5}} + \frac{38,832}{(1.03)^{-4}} + \frac{97,079}{(1.03)^{-3}} + \frac{116,500}{(1.03)^{-2}} + \frac{77,663}{(1.03)^{-1}} + \frac{38,832}{(1.03)^{0}}$$

$$- \frac{0.10 \times 371,700}{(1.03)^{1}} \quad 1/$$

$$= 378,627$$

(*1*) When burning oil:

	Year
First through 35th year	$93,020,000

(*2*) When burning coal:

	Year
First 3 years	$56,033,000
Fourth year through 35th year	37,355,000

(D) The plant is assumed to have a salvage value of zero and it is assumed that the oil capability will not be scrapped after 3 years but maintained in case of emergency.

(iv) The discount rate for the purpose of this example is 3 percent.

(9) *Analysis.*[13]

(i) *General cost test.*

(A) Compute the cost of using coal in a coal-fired powerplant from the start of operation.

[13] All dollars are in thousands.

$$\text{COST} = I + \sum_{i=1}^{N} \frac{(OM_i + FL_i)(1 - t) - t.DPR_i}{(1 + K)^i}$$

$$= 378,627 + \sum_{i=1}^{3} \frac{(15,885 + 56,033)(1 - 0.46)}{(1.03)^i} + \sum_{i=4}^{35} \frac{(15,885 + 37,355)(1 - 0.46)}{(1.03)^i} - \sum_{i=1}^{23} \frac{0.46 \times DPR_i}{(1.03)^i}\ ^{1/}$$

$$= 893,851$$

(B) Compute the cost of using oil in an oil fired powerplant throughout the useful life of the powerplant.

$$I = \sum_{i=-g}^{N} \frac{I_i - ITC_i\ ^{2/} - S_i}{(1 + K)^i}$$

$$= \frac{11,287}{(1.03)^{-4}} + \frac{22,574}{(1.03)^{-3}} + \frac{56,435}{(1.03)^{-2}} + \frac{79,009}{(1.03)^{-1}} + \frac{56,435}{(1.03)^0}$$

$$= 235,057$$

[1] ITC is recognized the year powerplant is put into operation.

$$\text{COST} = I + \sum_{i=1}^{N} \frac{(OM_i + FL_i)(1 - t) - t.DPR_i}{(1.03)^i}$$

$$= 235,057 + \sum_{i=1}^{35} \frac{(2,090 + 93,020)(1 - 0.46)}{(1.03)^i} - \sum_{i=1}^{23} \frac{0.46 \times DPR_i}{(1.03)^i}\ ^{1/}$$

$$= 1,264,388$$

(C) Compute the ration of the cost of using coal from the beginning of operation to the cost of using oil throughout the useful life of the powerplant.

$$R = \frac{\text{COST (COAL)}}{\text{COST (OIL)}}$$

$$= \frac{893,851}{1,264,388}$$

$$= 0.71$$

The ratio is less than 1.3. You are not eligible for either a permanent or temporary exemption using the general cost test and need not complete the general cost test. However, for illustrative purposes, we will continue.

(D) Compute the cost of using coal in a coal and oil capable powerplant assuming coal is not used until after the third year and oil is used for the first 3 years of operation.

[1] Depreciation is double declining balance switching over to straight line. The tax life is 23 years for the entire powerplant.

[2] ITC is not allowed on this powerplant.

$$I = \sum_{i=-5}^{N} \frac{I_i - ITC_i - S_i}{(1+K)^i}$$

$$= \frac{19,416}{(1.03)^{-5}} + \frac{50,119}{(1.03)^{-4}}$$

$$+ \frac{97,079}{(1.03)^{-3}} + \frac{116,500}{(1.03)^{-2}}$$

$$+ \frac{60,440}{(1.03)^{-1}} + \frac{43,170}{(1.03)^{0}}$$

$$- \frac{0.10 \times 386,730}{(1.03)^{1}}\ ^{1/}$$

$$+ \frac{49,927}{(1.03)^{2}} + \frac{24,963}{(1.03)^{3}}$$

$$- \frac{0.10 \times 74,890}{(1.03)^{4}}\ ^{2/}$$

$$I = 439,722$$

$$COST = I + \sum_{i=1}^{N} \frac{(OM_i + FL_i)(1-t) - t.DPR_i}{(1+K)^i}$$

$$= 439,722$$

$$+ \sum_{i=1}^{3} \frac{(2,090 + 93,020)(1 - 0.46)}{(1.03)^i}$$

$$+ \sum_{i=4}^{35} \frac{(15,885 + 37,355)(1 - 0.46)}{(1.03)^i}$$

$$- \sum_{i=1}^{23} \frac{0.46 \times DPR_i}{(1.03)^i}\ ^{1/} - \sum_{i=4}^{26} \frac{0.46 \times DPR_i}{(1.03)^i}\ ^{2/}$$

$$COST = 960,906$$

[1] ITC is recognized the year the plant is put into operation.

(E) Compute the ratio of the cost of using coal at the end of the third year to the cost of using oil throughout the life of the powerplant.

$$R = \frac{COST(COAL)}{COST(OIL)}$$

$$= \frac{960,906}{1,264,388}$$

$$= 0.76$$

(ii) *Special cost test.*

(A) Compute the cost of using coal in a coal capable powerplant assuming the length of the exemption is 3 years.

[2] ITC is recognized the year after the plant becomes coal capable.

$$COST = I \times \frac{\sum_{i=1}^{P} (1+K)^{-i}}{\sum_{i=1}^{N} (1+K)^{-i}}$$

$$+ \sum_{i=1}^{P} \frac{(OM_i + FL_i)(1-t) - t.DPR_i}{(1+K)^i}$$

$$COST = 378{,}627 \times \frac{\sum_{i=1}^{3} (1.03)^{-i}}{\sum_{i=1}^{35} (1.03)^{-i}}$$

$$+ \sum_{i=1}^{3} \frac{(15{,}885 + 56{,}033)(1 - 0.46)}{(1.03)^i}$$

$$\sum_{i=1}^{3} \frac{0.46 \times DPR_i}{(1.03)^i} \text{ 1/}$$

$$= 121{,}120$$

(B) Compute the cost of using oil in a coal and oil capable powerplant assuming the exemption is 3 years.

$$COST = 1 \times \frac{\sum_{i=1}^{P} (1+K)^{-i}}{\sum_{i=1}^{N} (1+K)^{-i}}$$

$$\sum_{i=1}^{P} \frac{(OM_i + FL_i)(1-t) - t.DPR_i}{(1+K)^i}$$

$$COST = 439{,}722 \times \frac{\sum_{i=1}^{3} (1.03)^{-i}}{\sum_{i=1}^{35} (1.03)^{-i}}$$

[1] Depreciation is double declining balance switching to straight line. The tax life is 23 years for the entire powerplant.

$$+ \sum_{i=1}^{3} \frac{(2090 + 93{,}020)(1 - 0.46)}{(1.03)^i}$$

$$- \sum_{i=1}^{3} \frac{0.46 \times DPR_i}{(1.03)^i} \quad 1/$$

$$= 163{,}027$$

(C) Compute the ratio of the cost of using coal to the cost of using oil.

$$R = \frac{COST\ (COAL)}{COST\ (OIL)}$$

$$= \frac{121{,}120}{163{,}027}$$

$$= 0.74$$

The ratio (R) is less than *1.3*. Therefore, you would not receive a temporary exemption.

§ 503.6 State approval required for powerplant.

(a) Where approval by the appropriate State regulatory authority is required prior to the construction or use of a new powerplant, you may submit a petition for an exemption for consideration by ERA prior to obtaining the approval.

(b) An exemption granted for a powerplant shall not become effective until you demonstrate to the satisfaction of ERA that all applicable approvals required by the State regulatory authority have been obtained.

§ 503.7 No alternate power supply—general requirement for certain permanent exemptions.

(a) *Application.* Section 212 of the Act provides for a permanent exemption for lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, state or local requirements, fuel mixtures, emergency purposes, reliability of service or intermediate load. To qualify for one of these exemptions, Section 213(c) of the Act requires that you demonstrate to the satisfaction of ERA that, despite reasonable good faith efforts, there is no alternative supply of electric power which is available within a reasonable distance at a reasonable cost without impairing short-run or long-run reliability of service. ERA, in determining whether you have satisfied this requirement, will consider only the first year of operation for your proposed plant. If you are unable to demonstrate that there is no alternate supply during this year, ERA will conclude that the absence of the proposed powerplant will not impair short-term reliability of service, and as a result may deny your exemption. This denial would not impair long-term reliability of service, since you may submit a petition for a powerplant that would begin operation one year later.

(b) *Criteria.* ERA will determine that you have no alternate supply of power if you demonstrate all of the following.

(1) You have made a diligent effort to reduce the need for the power from your proposed plant by implementing within your system whatever conservation measures are available and cost effective, including increasing the availability of alternate fuel-fired plants and by taking whatever measures are available to you (including, where appropriate, application for waivers from certain prohibitions of the National Energy Conservation Policy Act of 1978) to encourage or assist your customers in implementing cost-effective conservation. In judging whether a conservation measure is cost effective the capacity or energy it would replace should be compared with the life cycle cost of capacity or energy from your proposed plant including capital, operations and maintenance expenses, and fuel at imported petroleum prices.

(2) You have made a diligent effort to purchase firm power for the first year of operation to cover all or part of your projected shortfall at a cost that is less than 10 percent above the annualized cost of generating power from your proposed plant (including the capital, operation and maintenance expenses, and fuel at imported petroleum prices).

(3)(i) Despite these efforts, the reserve margin in your electric region in the absence of your proposed plant would fall below 20 percent during the first year of proposed operation; or

(ii) Despite these efforts, the reserve margin will be greater than 20 percent and you have demonstrated that reliability of service would be impaired. Your demonstration relates to factors not included in the calculation of reserve margin such as transmission constraints.

(c) *Evidence.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) The estimated peak demand for your system and the coincident peak demand for your electric region for the first year of operation of your proposed plant.

(2) The corresponding capacity projections, as well as any existing commitments by your system to purchase or sell power during that year.

(3) Evidence that you have solicited firm power contracts for the proposed first year operation, via letters to all potential sources (including non-utility sources) within or contiguous to your electric region, and also via advertisements.

(4) A calculation of the delivered cost of the firm purchased power offered in response to your solicitation(s) along with a detailed description of the method by which the annual cost of the purchased power is determined. Where relevant, the FERC Tariff Identifications intended as the basis for the purchase power contracts under negotiation (including the service schedules and/or exhibits which would apply to these contracts) should be provided.

(5) A calculation of the cost of power from your proposed plant during its initial year of operation. You may select the method of calculation, provided that the resulting cost may be meaningfully compared with the cost of purchased power. The calculation must include expenses due to capital, operations and maintenance, and fuel at imported petroleum prices. You may include cost effects of the economic dispatch of

[1] This term accounts for the initial investment required to make the plant oil capable. It does not reflect the additional investment necessary to burn coal. The depreciation method is double declining balance switching to straight line. The tax life is 23 years.

plants. The number of kilowatt hours being compared from the proposed plant and the purchased power should be the same.

(6) A description of the measures you will have taken prior to initial operation of your proposed plant to reduce energy losses within your own system, to improve the availability of your existing non-oil- or gas-fired plants, to shift part of your peak demand to off-peak periods, and to encourage or assist your customers in implementing cost-effective conservation measures.

(7) Estimates of the kilowatt and kilowatt-hour savings that would result from the conservation measures.

(8) A calculation of the net capacity shortfall in the first year of the proposed operation (compared to a 20 percent reserve margin) if your proposed plant is not built but all the reasonable purchase and conservation opportunities are exploited.

(d) *FERC Consultation.* ERA will forward a copy of any petition for which a showing under this section is required to the Federal Energy Regulatory Commission (FERC) promptly after it is filed with ERA, and ERA will consult with FERC before making a finding on "no alternative supply of power."

§ 503.8 [Reserved]

§ 503.9 Use of mixtures—general requirement for permanent exemptions.

(a) *Application.* ERA will not consider a petition for any of the following exemptions provided for in Section 212 of the Act (lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, state or local requirements, cogeneration, emergency purposes, reliability of service, or intermediate load) to be complete, adequate, or acceptable for filing unless you demonstrate to the satisfaction of ERA that you have considered the use of a mixture(s) for which an exemption under Section 503.38 (Fuel mixtures) of these regulations would be available.

(b) *Demonstration.* ERA will deny any of the exemptions listed above unless you demonstrate that use of such a mixture(s) is not economically or technically feasible in the unit for which you are requesting an exemption. You must submit to ERA at least the following evidence in order to make the demonstration required by this section:

(1) If use of a mixture(s) were required, you would be eligible for one of the following permanent exemptions provided for in the Act: lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, or state or local requirements, or

(2) Use of a mixture(s) is not technically or economically feasible in your specific unit due to design or special circumstances.

§ 503.10 Use of fluidized bed combustion not feasible—general requirement for permanent exemptions.

(a) *ERA finding.* ERA may deny any of the following exemptions provided for in Section 212 of the Act (lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, state or local requirements, cogeneration, emergency purposes, reliability of service, or intermediate load) if ERA finds on a site specific or generic basis that use of a method of fluidized bed combustion of an alternate fuel is economically and technically feasible.

(b) *Demonstration.* If ERA has made such a finding, ERA will deny your request for exemption unless you demonstrate that the use of a method of fluidized bed combustion is not economically or technically feasible. You must include in your Fuels Decision Report or any supplement thereto required by ERA (or in your petition for an emergency exemption) at least the following evidence:

(1) If use of a method of fluidized bed combustion were required, you would be eligible for one of the following permanent exemptions provided for in Section 212 of the Act: lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, or state or local requirements; or

(2) Use of a method of fluidized bed combustion is not technically or economically feasible in your specific unit due to design or special circumstances.

§ 503.11 Alternative sites—general requirement for permanent exemptions.

(a) *Application.* Section 212 of the Act provides for a permanent exemption for lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, state or local requirements, or intermediate load. To qualify, you must demonstrate to the satisfaction of ERA that you cannot use alternate fuels at reasonable alternative sites as well as at your proposed sites. You must show that:

(1) You examined all reasonable alternative sites in your effort to use alternate fuels; and

(2) You are unable to use alternate fuels at any of the alternative sites you considered at a cost which does not substantially exceed the cost of using imported petroleum, or, in special circumstances, for other reasons.

(b) *Evidence.* You must include in your Fuels Decision Report the following substantial evidence to corroborate the above requirements:

(1) A map indicating your proposed site and each of the alternative sites you considered;

(2) A description of each of the alternate fuels you considered for use at each alternative site you considered;

(3) A detailed description of the criteria you used to select the alternative sites you considered and to select the alternate fuels you examined for use at each alternative site;

(4) Copies or summaries of any studies you performed as part of, or in support of your search for reasonable alternative sites;

(5) All data required by § 503.5 (Cost calculation) supporting any contentions you make pertaining to the cost of using alternate fuels at alternative sites; and

(6) A detailed explanation of any contention you make concerning other reasons which would preclude use of alternative sites.

§ 503.12 Terms and conditions; compliance plans.

(a) *Terms and conditions generally.* You must comply with the terms and conditions of an exemption granted under the Act by the ERA, including terms and conditions requiring the use of effective fuel conservation measures.

(b) *Compliance plans for temporary exemptions.*

(1) A compliance plan certified by your duly authorized representative shall accompany a petition for a temporary exemption. The compliance plan shall include at least the following:

(i) A detailed schedule of progressive events and the dates upon which the events are to take place indicating how compliance with the applicable prohibitions of the Act will occur;

(ii) Evidence of binding contracts for fuel, or facilities for the production of fuel, which are required for you to comply with the applicable prohibitions of the Act; and

(iii) Any other documentary evidence which indicates an ability to comply with the applicable prohibitions of the Act.

(2) The exemption shall not be effective until the compliance plan is approved by ERA.

(3) *Revisions of compliance plans.* If the petition is granted, you must submit to ERA an updated compliance plan

certified by your duly authorized representative:

(i) At the end of each 12-month period from the effective date of the exemption;

(ii) Within 1 month of an alteration of any milestone in the compliance plan, together with the reasons for the alteration and its impact upon the scheduling of all other milestones in the plan; and

(iii) At any time the ERA, in its discretion, determines that a revised compliance plan may be necessary to reflect changes in circumstances.

(c) *Enforcement.* An exemption is subject to termination upon the violation of any provision of an exemption or any provision of the pertinent compliance plan.

Subpart C—Temporary Exemptions for New Powerplants

§ 503.20 Purpose and scope.

(a) This subpart implements the provisions contained in Section 211 of the Act with regard to temporary exemptions for new powerplants.

(b) This subpart establishes the criteria and standards which owners or operators of new powerplants who petition for a temporary exemption must meet to sustain their burden of proof under the Act.

(c) You shall submit all petitions for temporary exemptions for new powerplants in accordance with the procedures set out in Part 501 of these regulations.

(d) The duration of any temporary exemption granted under this subpart shall be measured from the date that the powerplant is placed in service.

§ 503.21 Lack of alternate fuel supply.

(a) *Eligibility.* Section 211(a)(1) of the Act provides for a temporary exemption due to lack of an alternate fuel supply. To qualify you must demonstrate to the satisfaction of ERA that:

(1) You made a good faith effort to obtain an adequate and reliable supply of an alternate fuel of the quality necessary to conform to the design and operation requirements of the new powerplant;

(2) For the period of the proposed exemption, the cost of using such a supply would substantially exceed the cost of using imported petroleum as a primary energy source as defined in Section 503.5 (Cost calculation) of these regulations; and

(3) You will be able to comply with the applicable prohibitions of these regulations at the end of the proposed exemption period.

(b) *Evidence required in support of a petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this Section:

(1) A description of your analysis of the alternate fuels you considered for use;

(2) A description of the alternate unit designs you considered in a good faith effort to comply with the applicable prohibitions;

(3) A description of the detailed design requirements you specified for the new powerplant, including capacity, alternate fuel capability, and all other specifications;

(4) A description of the range of specific fuel characteristics of all the fuels which can be used by the new powerplant;

(5) Evidence that you sought to obtain the full range of alternate fuels which could be used by the new powerplant, including bid requests, and/or advertisements for supply contracts and all responses thereto, as well as any other arrangements you attempted to make to secure supplies;

(6) Evidence of the contracts or other arrangements you have made to ensure a reliable and adequate supply of an alternate fuel at the end of the proposed exemption; and

(7) All data required by § 503.5 (Cost calculation) of these regulations necessary for computing the cost calculation formula.

(c) *Compliance plan.* You must submit to ERA a compliance plan in accord with Section 214 of the Act and § 503.12 of these regulations simultaneously with submission of your petition to satisfy ERA requirements for petition adequacy. You must submit an updated compliance plan as required by § 503.12 of these regulations and as required by the terms of any order granting an exemption under this subpart.

§ 503.22 Site limitations.

(a) *Eligibility.* Section 211(a)(2) of the Act provides for a temporary exemption due to a site limitation. To qualify for such an exemption, you must demonstrate that one or more of the following specific physical limitations relevant to the location or operation of your powerplant exist which, despite your diligent good faith efforts, cannot be overcome before the end of the proposed exemption period:

(1) alternate fuels would be inaccessible because of a specific physical limitation;

(2) transportation facilities for alternate fuels would be unavailable;

(3) adequate facilities for handling, using or storing an alternate fuel would be unavailable;

(4) adequate means for controlling and disposing of wastes would be unavailable;

(5) adequate and reliable supply of water would be unavailable; or

(6) other site limitations exist which would not permit the location or operation of the proposed powerplant using an alternate fuel.

(b) *Evidence to be Submitted in Support of the Petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) evidence that the site limitation is a physical limitation, and not a requirement of Federal, state, or local law which could be the basis of an exemption under § 503.36 (State or local requirements);

(2) evidence that alternative means for overcoming the specific site limitations were considered, with a detailed description of the efforts made to overcome the site limitations set out in your petition;

(3) evidence of the equipment or space requirements for which the site limitation is claimed; and

(4) evidence of contracts or other arrangements you have made to insure that the site limitation will be overcome and that you will comply with the prohibitions at the end of the proposed exemption period. Examples of evidence relevant to establishing a site limitation for purposes of a temporary exemption are as follows:

(i) detailed documentation of impediments, including rights of way problems, site diagrams, maps of the surrounding areas and other items essential to the showing of a site limitation;

(ii) identification of transportation facilities relevant to the specific site of the powerplant and demonstration why existing facilities cannot be utilized or new facilities constructed;

(iii) copies of bid requests, advertisements, and general efforts made to secure alternative transportation facilities;

(iv) identification of potential alternate fuel storage locations within a reasonable geographic area surrounding the proposed powerplant;

(v) detailed scale site plans of the entire facility which include those areas not directly involved with the specific boiler;

(vi) a specific listing of all equipment necessary and not currently available to properly handle alternate fuel;

(vii) copies of bid requests, advertisements and general efforts made to secure alternative fuel storage facilities;

(viii) copies of quotes from bona fide suppliers, indicating lead times for purchase and installation of required ancillary storage of handling equipment;

(ix) specific listing of any equipment necessary and not currently available to properly control and dispose of waste;

(x) identification of potential alternate waste disposal locations within a reasonable geographic area surrounding the proposed powerplant;

(xi) a description of efforts made to secure off site disposal areas, including the cost of acquisition of the sites, transportation facilities and waste handling costs involved in their use; and

(xii) copies of bid requests, advertisements, and general efforts made to secure waste control and disposal equipment.

(c) *Compliance Plan.* You must submit to ERA a compliance plan in accordance with § 503.12 of these regulations simultaneously with submission of your petition. You must submit an updated compliance plan, if applicable, as required by § 503.12 of these regulations and as may be required by the terms of any order granting an exemption under this subpart.

(d) *Duration.* This temporary exemption, taking into account any extensions and renewals, may not exceed five years.

§ 503.23 Inability to comply with applicable environmental requirements.

(a) *Eligibility.* Section 211(a)(3) of the Act provides for a temporary exemption due to an inability to comply with applicable environmental requirements. To qualify you must demonstrate to the satisfaction of ERA that despite diligent good faith efforts:

(1) You will be unable, as of the projected date of commencement of operation, to comply with the applicable prohibitions imposed by the Act without violating applicable Federal or state environmental requirements;

(2) You will be able to comply with the applicable prohibitions imposed by the Act and with applicable environmental requirements by the end of the temporary exemption period.

(b) *Criteria.* ERA's decision with regard to environmental compliance will be based solely on analysis of your capacity to physically achieve applicable environmental requirements. Your analysis should be directed toward those conditions or circumstances which make it physically impossible for you to comply during the temporary exemption period. The cost of compliance shall not enter into the analysis, but any cost-related considerations may be presented as part of a demonstration submitted under § 503.21.

(c) *Evidence required in support of the petition.* You must include at least the following evidence in order to make the demonstration required by this section:

(1) If you elect to seek a construction permit from EPA or an appropriate state agency prior to petitioning for an exemption from ERA, a copy of your application and a detailed synopsis of all supporting documents filed with or subsequent to your application to EPA or the appropriate agency.

(2) To the extent applicable, a copy of the EPA or state denial of your construction permit application;

(3) To the extent applicable, a detailed synopsis of the administrative record of the EPA or state or local permit proceedings;

(4) To the extent applicable, an analysis of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which would provide the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of the ability to meet applicable standards and criteria when using both the proposed fuel and all alternate fuels for which you are requesting an environmental exemption. All conclusions regarding the ability of the facility to comply must be based on accepted analytical techniques, such as air quality modeling, and must reflect current conditions of the area which would be affected by the facility. You are responsible for performing the necessary sampling and collecting sufficient data to accurately characterize these conditions. Environmental compliance must be examined in the context of the available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain requests for bids and other inquiries made and responses received by you concerning the availability and performance of pollution control equipment; contracts signed, if any, for an alternate fuel supply and for the purchase and installation of pollution control equipment; or other comparable evidence such as technical studies documenting efficacy of equipment to meet applicable requirements;

(6) An examination of the regulatory options available to you in seeking to achieve environmental compliance. This must include an analysis of the availability of offsets, if needed, and the potential for securing variances, and State Implementation Plan revisions, as appropriate. The analysis must illustrate and document your efforts, if any, to locate, identify, and acquire offsets, including agreements made by you with the state or other companies for acquisition of offsets. If an agreement to acquire offsets is conditioned upon the grant of a variance, or State Implementation Plan revision, you must submit a letter from the state agency indicating when a proceeding to effectuate the agreement will take place. The analysis must contain any correspondence initiated or received by you concerning these regulatory options and all technical studies you have relied upon to support your conclusions; and

(7) Evidence that there is no reasonable alternative site as specified in § 503.11 of these regulations.

In addition, you may submit any other documentation you believe demonstrates an inability to comply with applicable environmental requirements despite good faith efforts.

(d) *Compliance plan.* You must submit to ERA a compliance plan in accordance with § 503.12 of these regulations simultaneously with the submission of your petition. You must submit an updated compliance plan, if applicable, as required by § 503.12 of these regulations and as required by the terms of any order granting an exemption under this subpart.

(e) *Other actions.*

(1) Prior to your decision to submit an exemption application, it is recommended that you request a meeting with ERA and EPA or the appropriate state or local regulatory agency to discuss options for operating an alternate fuel-fired facility in compliance with applicable environmental requirements; and

(2) You must submit a copy to ERA of your application for a construction permit at the same time you submit it to EPA or the state agency.

(f) *Duration.* This temporary exemption, taking into accounting extension and renewals, may not exceed 5 years, and will be issued by ERA for such period up to and including 5 years as the petition demonstrates if necessary.

§ 503.24 Future use of synthetic fuels.

(a) *Eligibility.* Section 211(b) of the Act provides for a temporary exemption based upon the future use of synthetic fuels. To qualify, you must demonstrate to the satisfaction of ERA that:

(1) You will be able to comply with the applicable prohibitions imposed by the Act by the use of a synthetic fuel derived from coal or another alternate fuel as a primary energy source in your powerplant by the end of the proposed exemption period; and

(2) You will not be able to comply with the applicable prohibitions imposed by the Act before the end of the proposed exemption period by using a synthetic fuel in your powerplant.

(b) *Evidence required in support of the petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) Copies of studies relating to the economic and technical feasibility of using synthetic fuels by your proposed powerplant;

(2) Evidence of financial commitments made to construct, operate and maintain equipment which will be capable of using synthetic fuel as a primary energy source by the end of the proposed exemption period;

(3) Copies of bid requests, advertisements, contracts and/or other agreements relating to the production, purchase, and transportation of synthetic fuel; and

(4) Information regarding any permits that may be required by Federal or state agencies for the construction and operation of a powerplant using synthetic fuels.

(c) *Compliance plan.* You must submit to ERA a compliance plan in accordance with § 503.12 of these regulations simultaneously with the submission of your petition. You shall submit an updated compliance plan, if applicable, as required by § 503.12 of these regulations and as may be required by the terms of any order granting an exemption under this subpart.

(d) *Duration.* This temporary exemption may be granted for a period up to 5 years and may be extended for up to an additional 5 years.

§ 503.25 Public interest exemption.

(a) *Policy Note.* The use of coal and other alternate fuels in lieu of petroleum and natural gas is in the public interest. ERA will grant this temporary exemption where you are unable to comply immediately with the prohibitions of the Act, where the granting of the petition would be in the public interest, and where you will be in compliance with the prohibitions imposed by the Act at the end of the exemption period. In filing your petition, you are required to complete the portions of the Fuels Decision Report (FDR) specified in § 502 of these Interim Rules and demonstrate why your proposed facility could not burn a fuel mixture during the time the exemption is effective. ERA recognizes, however, that there are situations where the public interest would best be served by not requiring the FDR and mixture demonstration; consequently, ERA strongly urges you to request a prepetition conference where, after consideration of the facts of your case, ERA could waive all or part of these requirements. As an example, ERA will generally waive these rerequirements where you temporarily need the use of a natural gas- or petroleum-fired rental unit to provide steam until the ongoing construction of an alternate fuel-fired unit is completed.

(b) *Eligibility.* Section 211(c) of the Act provides for a temporary public interest exemption. To qualify, you must demonstrate to the satisfaction of ERA that:

(1) You are unable to comply with the applicable prohibitions imposed by the Act, except in extraordinary circumstances, during the period for which the exemption is requested, but that you will be capable of complying at the end of the proposed exemption period; and

(2) The granting of the petition would be in accord with the purposes of the Act and would be in the public interest.

(c) *Evidence required in support of the petition.* You must include in your Fuels Decision Report at least the following in order to make the demonstration required by this section:

(1) Substantial evidence to corroborate the eligibility requirements identified above;

(2) A demonstration that the use of a mixture, for which an exemption under § 503.38 (Fuel Mixtures) would be available, is not technically or economically feasible during the period the temporary public interest exemption is in effect; and

(3) Information and data required by § 502.4 (Introduction), § 502.7 (Evidence for Exemption Required), and § 502.12 (Conservation Measures) of the Fuels Decision Report as set out in Part 502.

(d) *Compliance Plan.* You must submit to ERA a compliance plan in accordance with § 503.12 of these regulations simultaneously with submission of your petition. You must submit, if applicable, an updated compliance plan as required by § 503.12 of these regulations or as may be required by the terms of any order granting an exemption under this subpart.

(e) *Duration.* This temporary exemption, taking into account extension and renewals, may not exceed 5 years.

Subpart D—Permanent Exemptions for New Powerplants.

§ 503.30 Purpose and scope.

(a) This subpart implements the provisions contained in Section 212 of the Act with regard to permanent exemptions for new electric powerplants.

(b) This subpart establishes the criteria and standards which owners or operators of new powerplants that petition for a permanent exemption must meet to sustain their burden of proof under the Act.

(c) If a petition for a permanent exemption is filed pursuant to § 503.31 (Lack of alternate fuel supply for the first 10 years of useful life); § 503.32 (Lack of alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum); § 503.33 (Site limitation); § 503.34 (Inability to comply with applicable environmental requirements); § 503.35 (Inability to obtain adequate capital); or § 503.36 (State or local requirements), the petitioner must demonstrate in the Fuels Decisions Report that his inability to use each reasonable alternate fuel would entitle him to one or more of the above exemptions.

(d) You must submit all petitions for permanent exemptions for new powerplants in accordance with the procedures set out in Part 501 of these regulations.

§ 503.31 Lack of alternate fuel supply for the first 10 years of useful life.

(a) *Eligibility.* Section 212(a)(1)(A)(i) of the Act provides for a permanent exemption due to lack of an adequate and reliable supply of alternate fuel within the first 10 years of useful life of the new powerplant. To qualify you must demonstrate to the satisfaction of ERA that:

(1) You made a good faith effort to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the new powerplant; and

(2) Such a supply is not likely to be available within the first 10 years of useful life of the new powerplant.

(b) *Evidence required in support of a petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this Section:

(1) A description of the alternate unit designs you considered in a good faith

effort to comply with the applicable prohibitions;

(2) A description of the detailed design requirements you specified for the new powerplant, including capacity, alternate fuels capability, and all other pertinent specifications;

(3) A description of the range of specific fuel characteristics of all the fuels which can be used by the new powerplant;

(4) Evidence that you sought to obtain the full range of alternate fuels which could be used by the new powerplant;

(5) Evidence that you solicited at least five bids from suppliers who could reasonably be expected to supply an adequate and reliable supply of the quality and quantity of alternate fuel needed, including bid requests and/or advertisements for supply contracts and all proposals or responses thereto, as well as any other arrangements you attempted to make to secure supplies;

(6) A description of your analysis of the alternate fuel you considered, including a discussion of how you made your assessment that an adequate and reliable supply of the quality and quantity of fuel needed would not be available within the first 10 years of useful life of the new powerplant.

§ 503.32 Lack of alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum.

(a) *Eligibility.* Section 212(a)(1)(A)(ii) of the Act provides for a permanent exemption due to lack of an alternate fuel supply at a cost which does not substantially exceed the cost of using imported petroleum. To qualify you must demonstrate to the satisfaction of ERA that:

(1) You made a good faith effort to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the new powerplant; and

(2) The cost of using such a supply would substantially exceed the cost of using imported petroleum as a primary energy source during the useful life of the new powerplant as defined in § 503.3 (Cost Calculation) of these regulations.

(b) *Evidence required in support of a petition.* You must include in your Fuels Decision Report the following evidence in order to make the demonstration required by this section:

(1) A description of the alternate unit designs you considered in a good faith effort to comply with the applicable prohibitions;

(2) A description of the detailed design requirements for the new powerplant you specified, including capacity, alternate fuels capability, and all other pertinent specifications;

(3) A description of the range of specific fuel characteristics of all the fuels which can be used by the new powerplant;

(4) Evidence that you sought to obtain the full range of alternate fuels which could be used by the new powerplant, including bid requests and/or advertisements for supply contracts, all proposals and responses thereto, as well as any other arrangements you attempted to make to secure supplies;

(5) All data required by § 503.5 of these regulations (Cost Calculation) necessary for computing the cost calculation formula; and

(6) A description of your analysis of the alternate fuel you considered.

§ 503.33 Site limitations.

(a) *Eligibility.* Section 212(a)(1)(B) of the Act provides for a permanent exemption due to a site limitation. To qualify for such an exemption, you must demonstrate that despite good faith efforts:

(1) alternate fuels are inaccessible as a result of a specific physical limitation to the location or operation of the proposed powerplant;

(2) transportation facilities for alternate fuels would be unavailable;

(3) adequate facilities for handling, using or storing alternate fuels would be unavailable;

(4) adequate means for controlling and disposing of wastes would be unavailable;

(5) adequate and reliable supply of water would be unavailable; or

(6) other site limitations exist which would not permit the location or operation of the proposed powerplant using an alternate fuel, and these limitations cannot be reasonably expected to be overcome within five years after commencement of operations.

(b) *Evidence to be Submitted in Support of the Petition.* You must include in your Fuels Decision Report at least the following in order to make the demonstration required by this Section:

(1) evidence that the site limitation is a physical limitation, and not a requirement of Federal, State, or local law which could be the basis of an exemption under § 503.36 (State or local requirements);

(2) evidence that alternative means for overcoming the specific site limitations were sought, with a detailed description of the efforts made to overcome the site limitations set out in your petition; and

(3) evidence of the equipment or space requirements for which the site limitation is claimed. Examples of evidence relevant to establishing a site limitation for purposes of a permanent exemption are as follows:

(i) detailed documentation of impediments, including rights of way problems, site diagrams, maps of the surrounding areas and other items essential to the showing of a site limitation;

(ii) identification of transportation facilities relevant to the geographic site of the powerplant and demonstration why existing transportation facilities cannot be utilized or new facilities constructed;

(iii) identification of potential alternate waste disposal locations within a reasonable geographic area surrounding the proposed powerplant;

(iv) a description of efforts made to secure off-site disposal areas, including the cost of acquisition of the sites, transportation facilities and waste handling costs involved in their use; and

(v) copies of bid requests, advertisements, and general efforts made to secure waste control and disposal equipment;

(vi) copies of bid requests, advertisements and general efforts made to secure alternative transportation facilities;

(vii) identification of potential alternate fuel storage locations within a reasonable geographic area surrounding the proposed powerplant;

(viii) detailed scale site plans of the entire facility which include those areas not directly involved with a specific powerplant;

(ix) a specific listing of all equipment necessary and not currently available to properly handle alternate fuels;

(x) copies of bid requests, advertisements and general efforts made to secure alternative fuel storage facilities;

(xi) copies of quotes from bona fide suppliers, indicating lead times for purchase and installation or required ancillary storage or handling equipment;

(xii) specific listing of any equipment necessary and not currently available to properly control and dispose of waste.

§ 503.34 Inability to comply with applicable environmental requirements.

(a) *Eligibility.* Section 212(a)(1)(C) of the Act provides for a permanent exemption due to the inability to comply with the applicable environmental requirements. To qualify you must

demonstrate to the satisfaction of ERA that, despite good faith efforts:

(1) You will be unable within 5 years after beginning operation to comply with the applicable prohibitions imposed by the Act without violating applicable Federal or state environmental requirements; and

(2) Reasonable alternative sites which would permit the use of alternate fuels in compliance with applicable Federal or state environmental requirements are not available.

(b) *Criteria.* ERA's decision with regard to environmental compliance will be based solely on an analysis of your capacity to physically achieve applicable environmental requirements. The cost of compliance shall not enter into the analysis, but any cost-related considerations may be presented as part of a demonstration submitted under § 503.32.

(c) *Evidence supporting petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) If you elect to seek a construction permit from EPA or an appropriate State agency prior to petitioning for an exemption from ERA, a copy of your application and a detailed synopsis of all supporting documents filed with or subsequent to your application to EPA or the appropriate State agency;

(2) To the extent applicable, a copy of the EPA or State denial of your construction permit application;

(3) To the extent applicable, a detailed synopsis of the administrative record of the EPA or State or local permit proceedings;

(4) To the extent applicable, an analysis of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which would provide the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of the ability to meet applicable standards and criteria when using both the proposed fuel and all alternate fuels for which you are requesting an environmental exemption. All conclusions regarding the ability of the facility to comply must be based on accepted analytical techniques, such as air quality modeling, and must reflect current conditions of the area which would be affected by the facility. You are responsible for performing the necessary sampling and collecting sufficient data to accurately characterize these conditions. Environmental compliance must be examined in the context of the available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain requests for bids and other inquiries made and responses received by you concerning the available and performance of pollution control equipment, or other comparable evidence such as technical studies documenting efficacy of equipment to meet applicable requirements.

(6) An examination of the regulatory options available to you in seeking to achieve environmental compliance. This must include an analysis of the availability of offsets, if needed, and the potential for securing variances, State Implementation Plan (SIP) revisions, as appropriate. The analysis must illustrate and document your efforts, if any, to locate and identify available offsets, and to secure variances and SIP revisions. The analysis must contain any correspondence initiated or received by you concerning these regulatory options and all technical studies you have relied upon to support your conclusions; and

(7) Evidence that there is no reasonable alternative site as specified in § 503.11 of these regulations.

In addition, you may submit any other documentation you believe demonstrates an inability to comply with applicable environmental requirements despite good faith efforts.

(d) *Other actions.*

(1) Prior to deciding to submit an exemption application, it is recommended that you request a meeting with ERA and EPA or the appropriate state or local regulatory agency to discuss options for operating an alternative fuel-fired facility in compliance with the applicable environmental requirements; and

(2) You must submit a copy to ERA of your application for a construction permit at the same time you submit it to EPA or the state agency.

§ 503.35 Inability to obtain adequate capital.

(a) *Eligibility.* Section 212(a)(1)(D) of the Act provides for a permanent exemption due to inability to obtain adequate capital. To qualify you must demonstrate to the satisfaction of ERA that:

(1) Despite good faith efforts you will be unable to comply with the applicable prohibitions imposed by the Act because you cannot raise the additional capital required for an alternate fuel-capable powerplant beyond that required for your proposed powerplant and you cannot raise this additional capital due to specific restrictions (e.g., covenants on existing bonds) which constrain management's ability to raise debt or equity capital; and

(2) These specific restrictions on your ability to raise debt or equity capital could not be alleviated by any future action of your public utility commission or any other regulatory authority.

(b) *Evidence required in support of the petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) A statement of the state regulatory authority's policies on utility capital structure and formation, on the recognition of allowance for funds used during construction (in the utility's net plant) and of construction work in progress (in the utility's rate base), and on the accounting procedure for recognizing tax credits (flow-through or normalized).

(2) Relevant records pertaining to the utility's specific efforts to raise capital associated with the proposed powerplant.

(3) Five-year history of the utility's capital structure recognizing specific security issues and their current yields and investment ratings. Indicate where a security issued has specific ties to an on-line or scheduled generating unit.

(4) Five-year summary of the utility's financial record as indicated by the standard financial indicators including cash earnings and dividend records; time interest coverage ratios; price-earnings ratios; and market-to-book value ratios.

(5) Projected changes in the utility's capital structure and financial indicators in the case where the powerplant consumes:

(i) Alternate fuel; and

(ii) Oil or natural gas.

§ 503.36 State or local requirements.

(a) *Eligibility.* Section 212(b) of the Act provides for an exemption due to state or local requirements. To qualify you must demonstrate to the satisfaction of ERA that:

(1) With respect to the proposed site of the powerplant, the operation or construction of the new powerplant using an alternate fuel is infeasible because of a state of local requirement other than a building code, nuisance or zoning law;

(2) You have in good faith attempted unsuccessfully to obtain a variance from the state or local requirement or have demonstrated why none is available;

(3) The granting of the exemption would be in the public interest and

would be consistent with the purposes of the Act;

(4) You are not entitled to an exemption under the regulations issued pursuant to Sections 212(a)(1)(A)–(D), and (a)(2), of the Act, at the site of the proposed powerplant or at any reasonable alternate site for all alternate fuels; and

(5) At the proposed site and at every reasonable alternative site where you are not entitled to an exemption under the regulations issued pursuant to Sections 212(a)(1)(A)–(D), and (a)(2), of the Act for all alternate fuels, you nevertheless would be barred at each such proposed or alternative site from burning an alternate fuel by reason of a state or local requirement.

(b) *Evidence required in support of a petition.* To submit an adequate petition for review by ERA, you must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) A copy of the pertinent state or local requirement with its citation and its legislative history;

(2) The identification and location of the administrative body which implements the requirement;

(3) A description of your attempts to obtain a variance from the requirements or a demonstration of why none is available;

(4) A description of any activities you were involved in after April 20, 1977, pertaining to the enactment of the requirement;

(5) a description of equipment, procedures, and the advance planning time necessary to comply with the requirement;

(6) A detailed description of why compliance with the state or local requirement is infeasible;

(7) The impact upon you and/or your local community, if any, should your petition be denied;

(8) An explanation of the reasons why granting this exemption would be in the public interest; and

(9) An analysis of why you cannot qualify for any of the exemptions listed in paragraph (a)(5) of this section for all alternate fuels at your proposed site and at reasonable alternative sites (§ 503.11).

(c) *Exercise of discretion by ERA.* ERA may refuse to grant this exemption to you if it determines that such grant would not be in the public interest or in accordance with the purposes of the Act, notwithstanding the fact that the evidence you have furnished to ERA in your exemption petition substantiates that your facility would otherwise be eligible to receive the exemption.

§ 503.37 Cogeneration.

(a) *Eligibility.* Section 212(c) of the Act provides for a permanent exemption for cogeneration. To qualify you must show that economic and other benefits of cogeneration are unobtainable unless petroleum or natural gas, or both, are used by demonstrating to the satisfaction of ERA at least the following minimum criteria:

(1) The oil or gas to be consumed by the cogeneration facility will be less than that which would otherwise be consumed in the absence of the cogeneration facility where the calculation of savings is in accordance with paragraph (c) of this section; or

(2) It would be in the public interest to grant an exemption to the cogeneration facility because of special circumstances such as technical innovation or maintaining industry in urban areas.

(b) *Specifications of the cogeneration facility.*

(1) A person proposing to construct a cogeneration facility may apply for an exemption under this section if the amount of net electricity that is either sold or exchanged is 50 percent or more of the useful energy output of the facility. If the amount is less than 50 percent, see § 505.27 (Installations). Net electricity excludes sales or exchanges among owners of the cogeneration facility.

(2) Electricity generated by the proposed cogeneration facility must constitute more than 10 percent of the useful energy output of the facility and less than 90 percent of the useful energy output.

(c) *Calculation of oil and gas savings.* There is an oil and gas savings if the oil or gas to be consumed by the cogeneration facility will be less than that which would otherwise be consumed in the absence of the cogeneration facility. The calculation of the oil and gas which would otherwise be consumed must be in accordance with paragraphs (c) (1) and (2) of this section.

(1) Except for the case described in paragraph (c)(2), of this section, the oil or gas which would otherwise be consumed must be calculated as follows:

(i) You may include the oil or gas that would be consumed by facilities that are or would be too small to be covered by the FUA regulations. In the case of new small industrial units, you must demonstrate that it would be reasonable to construct units of that size.

(ii) You may include the oil or gas that would be consumed by units in place (existing or exempt) covered by FUA if they are less than 40 years old in the case of a field-erected unit or less than 20 years old in the case of a package unit. In the case of existing units, you may not include units that have burned an alternate fuel or are capable of burning an alternate fuel, and, you may only include units described in this paragraph if they will be retired or shut down if this exemption is granted.

(iii) You may include the oil or gas that would be consumed by units not yet constructed that would be covered by the FUA regulations if you can demonstrate that each unit would be entitled to an exemption.

(iv) You may include the oil or gas that would be consumed by powerplants to generate electricity supplied to the grid to the extent that such electricity, if you cogenerate, will no longer be supplied by the grid. The oil or gas portion must be based on a 10 year forecast that includes new construction and retirement of plants within those 10 years.

(2) In the case of a cogeneration facility that would consist of an existing unit or an exempted unit and a new unit, you must calculate the amount of oil or gas that would otherwise be consumed as the sum of:

(i) The five-year annual average oil or gas consumption of the existing or exempted unit; and

(ii) The amount that would be consumed in units described in paragraph (c)(1) (i)–(iv), of this section that would now be satisfied by the new cogeneration facility.

(d) *Evidence required in support of a petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) An engineering description of the cogeneration system, including proposed output and uses thereof, with sufficient detail to ensure that the facility qualifies as a cogeneration facility;

(2) A detailed oil and natural gas savings calculation identifying the projected oil or natural gas consumption of the cogeneration facility and the oil or natural gas that would otherwise be used;

(3) Identification of the FUA status of the proposed and displaced units with respect to coverage and designation as new, existing, or exempted, age of units, and alternate fuel capability of units;

(4) Identification of all persons and their roles in the proposed cogeneration facility;

(5) Where a demonstration is required that the units would be entitled to an exemption, submission of all evidence required by the regulations with respect

to the applicable exemptions, including the alternate site showings; and

(6) In the case of paragraph (a)(2) of this section, an explanation of the public interest factors you believe should be considered by ERA.

(e) *Exercise of discretion by ERA.* ERA may refuse to grant this exemption to you if it determines that such grant would not be in the public interest or in accordance with the purposes of the Act, notwithstanding the fact that the evidence you have furnished to ERA in your exemption petition substantiates that your facility would otherwise be eligible to receive the exemption.

§ 503.38 Permanent exemption for certain fuel mixtures containing natural gas or petroleum.

(a) *Eligibility.* Section 212(d) of the Act provides for a permanent exemption for certain fuel mixtures. To qualify you must demonstrate to the satisfaction of ERA that:

(1) You propose to use a mixture of natural gas or petroleum and an alternate fuel as a primary energy source;

(2) The amount of petrolem or natural gas you propose to use in the mixture will not exceed the minimum percentage of the total annual Btu heat input needed to maintain operational reliability of the powerplant consistent with maintaining a reasonable level of fuel efficiency.

(b) *Evidence required in support of a petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) A complete description of the fuel mixture, component elements of the mixture, and percentage of each component to be utilized;

(2) Your design specifications for the unit for which you are requesting an exemption; and

(3) An engineering assessment of the proportions of petroleum or natural gas needed to maintain operational reliability and an adequate level of fuel efficiency.

(c) *Reporting requirement.* If the exemption is granted, you must submit an annual report to ERA certifying that the affected units have used no more than the percentage of oil or natural gas specified in the exemption order. The certification shall be executed by your duly authorized representative.

(d) *Solar mixtures.* ERA will grant a permanent mixtures exemption for the use of a mixture of solar energy (including wind, tide, and other intermittent sources) and petroleum or natural gas, where:

(1) Solar energy will account for at least 20 percent of the total annual Btu heat input of the unit; and

(2) You propose an acceptable plan to ERA which—

(i) Meets the evidence requirements set forth in paragraph (b) of this section; and

(ii) Contains a compliance plan prepared in accordance with § 503.12 of these regulations.

§ 503.39 Emergency purposes.

(a) *Eligibility.* Section 212(e) of the Act provides for a permanent exemption for emergency purposes. To qualify you must demonstrate to the satisfaction of ERA that you will operate and maintain the powerplant for emergency purposes only.

(b) *Definition.* For the purpose of this permanent exemption, an emergency exists when the operating utility would be required to curtail noninterruptible electric supply to its industrial customers.

(c) *Evidence required in support of a petition.* You must include in your petition at least the following evidence in order to make the demonstration required by this section:

(1) A certificate executed by a duly authorized officer of the operating utility stating that emergency operation under the provisions of this exemption will occur only when noninterruptible electric supply to industrial customers would be curtailed;

(2) All data required by § 503.7 (No alternative power supply) of these regulations demonstrating that, despite reasonable good faith efforts, there is no supply of electric power which is available within a reasonable distance at a reasonable cost without impairing short-run or long-run reliability of service;

(3) All data required by § 503.9 (Use of mixtures—general requirement) of these regulations demonstrating that use of a mixture(s) is not economically or technically feasible; and

(4) All data required by § 503.10 (Use of fluidized bed combustion not feasible—general requirement) if ERA has made a generic or site-specific finding that the use of a method of fluidized bed combustion of an alternate fuel is economically and technically feasible.

(d) *Additional information.* You must submit the following additional information:

(1) All data required by § 502.11 (Petroleum and natural gas use) of these regulations;

(2) All data required by § 502.12 (Conservation measures) of these regulations which describe any oil or natural gas conservation measures you have taken or intend to take if the exemption is granted; and

(3) All data required by § 502.13 (Environmental impacts analysis) of these regulations which will assist ERA to fulfill its responsibilities under the National Environmental Policy Act (NEPA).

(e) *Reporting requirement.* At the end of each 12-month period from the effective date of the exemption, you must report to ERA the monthly and annual amounts of electricity generated and fuel used under the provisions of this exemption with a description of the purposes of use.

§ 503.40 Permanent exemption for powerplants necessary to maintain reliability of service.

(a) *Eligibility.*

(1) Section 212(f) of the Act provides for a permanent exemption to maintain reliability of service. To qualify you must demonstrate to the satisfaction of ERA that:

(i) You are not capable of complying with the applicable prohibitions imposed by the Act without an impairment of reliability of service as measured by the loss of load probability technique described in paragraphs (a)(2) and (a)(3) of this section; and

(ii) despite diligent good faith efforts, you are not able to make the demonstration necessary to obtain a permanent exemption on the basis of lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, or certain state or local requirements in the time required to prevent an impairment of reliability of service, or you are not able to construct an alternate fuel-fired plant in the time required to prevent an impairment of reliability of service.

(2) You must calculate reliability of service utilizing the loss of load probability (LOLP) technique. The LOLP must be computed for your electrical region using any 12-month period that includes the date of initial operation. It is to be calculated as the sum of either the weekly or the monthly estimates of hourly load/capacity deficits. You may decide whether to perform the calculation using weekly or monthly data. The LOLP calculation must take into consideration equipment forced outage rates, projected customer electrical demand, and generating capacity projections for the electrical region, including existing generating capacity, planned generating capacity additions and projected firm bulk electrical purchases and sales, and

projected retirements. If necessary, you may also calculate LOLP with modifications to account for transmission constraints, energy shortages, and other factors that are not adequately addressed by adhering to the foregoing specifications. You will need to discuss why such modifications are appropriate.

(3) Reliability of service will be considered impaired if the LOLP for a 12-month period, including the initial operational date of the proposed unit, is greater than:

(i) One day in 5 years if your proposed powerplant will start operating within 4 years from the filing of your petition;

(ii) One day in 3 years if your proposed powerplant will start operating between 4 and 6 years from the filing of your petition; or

(iii) One day in one year if your proposed powerplant will start operating in 6 or more years from the filing of your petition.

(4) You may choose to argue that your case for impaired reliability is supportable by criteria other than in paragraph (a)(2) of this section. If so, you must present this argument, and propose an approach for its justification, in a prepetition conference for ERA concurrence.

(b) *Evidence supporting the petition.* To submit an adequate petition for review by ERA you must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) All data you used in determining the loss of load probability;

(2) An explanation including equations of how you are calculating the loss of load probability;

(3) A description of your method and assumptions for projecting demand for your system and for your electric region;

(4) Your strategy for ending your period of reliability impairment, describing the measures you expect to take to reduce your demand and/or to increase your supply of power from sources other than your proposed plant that are either alternate fuel-fired or qualify for other exemptions;

(5) A calculation of your expected date of termination for your period of impairment. You may specify several alternate termination dates, each corresponding to a different combination of major events that are beyond your control (such as slippages of a new plant being built by a different utility in your electric region);

(6) An explanation of why there is not enough time to construct an alternate fuel-fired plant to prevent impairment of reliability of service or why there is not enough time to obtain one of the exemptions listed in paragraph (a)(1)(ii) of this section;

(7) An explanation of why the type and size of your proposed plant is the most appropriate choice, considering the conditions of operation in paragraph (c) of this section; and

(8) In addition, you may include other evidence that you believe is relevant to your case, such as:

(i) Evidence that the reliability advantages of coordination on an electric region basis cannot be achieved to an extent sufficient to remove your "impairment of reliability" by the first year of operation, reasons for this deficiency, and an estimate of when such coordination could be implemented in your region; or

(ii) Evidence that your system has a unique situation that requires the use of different reliability criteria.

(c) *Terms and conditions.* If you obtain this discretionary permanent exemption, you will be permitted to operate your proposed plant only for the purposes of preventing an impairment of reliability of service. Your "initial period of impairment" will extend from the date of initial operation of your proposed powerplant until the earliest date when you can reduce your LOLP to less than 1 day in 5 years by means of measures which are either in compliance with the prohibitions in the Act or which have qualified for other exemptions from these prohibitions. ERA, at the time it grants this exemption, will specify the expected termination date of your initial period of impairment. If circumstances beyond your control, which could not reasonably be anticipated at the time your petition was filed, cause the LOLP of your electric region to exceed 1 day in 5 years either at the end of this period or at any subsequent time, you may continue operation or recommence operation. You must report to ERA at the end of each calendar year the amounts of oil and natural gas used under this exemption. You must also supply detailed LOLP calculations to support the continuation of recommencement of operation.

(d) *Exercise of discretion by ERA.* ERA may refuse to grant this exemption to you if it determines that such grant would not be in the public interest or in accordance with the purposes of the Act, notwithstanding the fact that the evidence you have furnished to ERA in your exemption petition substantiates that your facility would otherwise be eligible to receive the exemption.

(e) *Peakload use.* You may apply for a peakload exemption in addition to this exemption for the same unit. You must meet the eligibility and evidence requirements of each exemption to obtain them. You must also comply with the reporting requirements of each.

§ 503.41 Peakload powerplants.

(a) *Eligibility.* (1) *Proposed use of petroleum.* Section 212(g) of the Act provides for a permanent exemption for peakload powerplants if you propose to use petroleum as a primary energy source in a new peakload powerplant, or propose to construct a peakload powerplant to use petroleum without the capability to use an alternate fuel as a primary energy source. To qualify you must certify to ERA that the powerplant will be operated solely as a peakload powerplant and to meet peakload demand for the life of the powerplant.

(2) *Proposed use of natural gas.* Section 212(g) of the Act provides for a permanent exemption for peakload powerplants if you propose to use natural gas as a primary energy source in a new peakload powerplant, or propose to construct a peakload powerplant to use natural gas without the capability to use an alternate fuel as a primary energy source. To qualify:

(i) You must certify to ERA that the powerplant will be operated solely as a peakload powerplant and to meet peakload demand for the life of the powerplant; and

(ii) The Administrator of the EPA or the Director of the appropriate state air pollution control agency must certify that the use by the powerplant of any available alternate fuel as a primary energy source will cause or contribute to a concentration, in an air quality control region or any area within the region, of a pollutant for which any national air quality standard is or would be exceeded.

(b) *Evidence required in support of a petition.* To submit an adequate petition for review by ERA you must include in your petition at least the following evidence in order to make the demonstration required by this section.

(1) The petition must be accompanied by a sworn statement signed by a duly authorized officer of the electric utility which will operate the powerplant certifying that the powerplant is to be operated solely as a peakload powerplant and to meet peakload demand for the life of the plant. The certification must set forth the design capacity of the powerplant and the maximum allowable generation of the powerplant in kilowatt hours according to the definition of peakload for each 12 months of operation as a peakload powerplant.

(2) If you propose to use natural gas or construct a powerplant to use natural gas in lieu of an alternate fuel as a primary energy source, an air quality certification must have been prepared for the Secretary by the Administrator of the EPA or the Director of the appropriate state air pollution control agency which meets the requirements contained in paragraph (a)(2)(ii) of this section.

(3) If your proposed peakload powerplant is to be other than a combustion turbine powerplant you must describe what constitutes peakload demand on your system, how the peakload demand is to be met, including the projected order of dispatch of existing and proposed powerplants, and an estimate of the number of kilowatt hours that the proposed plant would generate during its first 12 months of operation to meet peakload demand. ERA may also request this information from petitioners whose proposed plant is a combustion turbine.

(c) *Additional information.* You must submit the following additional information:

(1) All data required by § 502.11 (Petroleum and natural gas use) of these regulations;

(2) All data required by § 502.12 (Conservation measures) of these regulations which describe any oil or natural gas conservation measures you have taken or intend to take if the exemption is granted; and

(3) All data required by § 502.13 (Environmental impacts analysis) of these regulations which will assist ERA to fulfill its responsibilities under the National Environmental Policy Act (NEPA).

(d) *Liability for operating in excess of exemption.* The operation of a peakload powerplant which has been granted this exemption in excess of that allowed by the exemption shall be subject to penalties under Title VII, Subtitle C of the Act unless the powerplant meets the criteria set forth in section 721(c) of the Act.

(e) *Reporting requirement.* If the petition is granted, you must report to ERA, at the end of each 12-month period from the first day of operation of the powerplant and, if applicable, upon reaching the maximum number of kilowatt hours of permitted generation within each 12-month period, the name, location, and design capacity of the exempted unit, the number of hours of operation permitted by the exemption, and the number of hours of actual operation.

§ 503.42 Intermediate load powerplants.

(a) *Eligibility.* Section 211(h) of the Act provides for an exemption for use by intermediate load powerplants of petroleum as a primary energy source. To quality you must demonstrate to the satisfaction of ERA all of the following.

(1) The Administrator of the EPA or the Director of the appropriate state air pollution control agency has certified that the use of any available alternate fuel as a primary energy source will cause or contribute to a concentration, in an air quality control region or any area within such region, of a pollutant for which any national ambient air quality standard is or would be exceeded as described in paragraph (c) of this section.

(2) The powerplant to be constructed and operated will replace no more than the equivalent generating capacity of existing units which:

(i) Permanently cease operation within 1 month of commencement of operation of the new powerplant;

(ii) Use natural gas or petroleum as a primary energy source;

(iii) Are owned by the same person who is to operate the new powerplant; and

(iv) Would, if they burned coal, cause or contribute to a pollutant concentration in a manner described in paragraph (a)(1) of this section.

(3) The powerplant is to be operated only as an intermediate load powerplant in which the electrical generation (in kilowatt hours) for any 12-calendar-month period shall not exceed the powerplant's design capacity multiplied by 3,500 hours.

(4) The net heat input rate for the powerplant will be maintained at or less than 9,500 Btu's per kilowatt hour throughout the useful life of the powerplant.

(5) You are not entitled to an exemption under the regulations issued pursuant to Sections 212(a)(1)(A)-(D), and (a)(2), of the Act, at the site of the proposed powerplant or at any reasonable alternate site for all alternate fuels.

(6) The powerplant is to be constructed with the capability to use a synthetic fuel derived from an alternate fuel as a primary energy source.

(b) *Evidence supporting the petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the determination required by this section;

(1) An air quality certification for this unit prepared by the EPA or state air pollution control agency, meeting the requirements of paragraph (a)(1) of this section, including a listing of all alternative fuels covered by the certification;

(2) A description of the existing powerplants to be replaced by the new intermediate load powerplant which shall include—

(i) The name and location of each of the existing powerplants;

(ii) The volume of fuel consumed by type for the previous 2 years by the existing powerplants; and

(iii) The corporate ownership of the existing powerplants;

(iv) The reasons for claiming that the existing powerplants would cause or contribute to a pollutant concentration if they used coal as a primary energy source;

(3) An affidavit executed by a duly authorized officer of the electric utility which will operate the proposed powerplant certifying that the powerplant shall be operated at all times in the future only as an intermediate load powerplant. The certification shall set forth the design capacity of the proposed powerplant and the maximum allowable generation of the proposed powerplant in kilowatt hours for its first 12 months of operation as an intermediate load powerplant;

(4) An affidavit by a duly authorized officer and a qualified engineer of the utility operating the powerplant which certifies that the powerplant can operate at a heat rate of 9,500 Btu's per kilowatt hour or less throughout the useful life of the powerplant;

(5) An affidavit by a duly authorized officer and a qualified engineer of the operating utility certifying that the powerplant will meet the synthetic fuels capability requirement described in paragraph (a)(6) of this section, identifying the specific synthetic fuels, and agreeing to cease using petroleum when ERA has found that such synthetic fuels are available;

(6) An analysis of why you cannot qualify for the exemptions listed in paragraph (a)(5) of this section for all alternate fuels at the site of your proposed powerplant or at any reasonable alternate site. As part of your analysis you should identify at least one site at which an intermediate load powerplant burning an alternate fuel could not be ruled out by the criteria in any of the above-named exemptions, and should identify the type of plant and the fuel;

(7) Identification of the synthetic fuel(s) your proposed plant is designed to use, with appropriate documentation including:

(i) The reasons for your choice;

(ii) Your expected source of synthetic fuel, if known;

(iii) The year when you expect the synthetic fuel to be available in adequate quantity at an acceptable price;

(iv) Estimates of the future prices of the synthetic fuel your plant would be designed to use;

(v) Your role, if any, in developing the facilities to produce the synthetic fuel;

(vi) The special features of your proposed plant that will enable it to use synthetic fuel(s);

(vii) Your basis for believing that these fuels can be burned in your proposed plant in conformance with applicable Federal and state environmental standards.

(c) *Terms and conditions.* ERA, if it grants you this exemption, will set as a condition the amount of oil to be used by the proposed powerplant. In general, ERA would require that the granting of this exemption result in a reduction in oil use or a reduction in the rate of oil increase by your system. The reduced oil use would be achieved by ceasing operation of the applicable existing units and by employing the more efficient proposed unit in their place.

(d) *Reporting requirement.* If the petition is granted, you must report to ERA, at the end of each 12-month period from the first day of the month following the effective date of the exemption and, if applicable, upon reaching the maximum number of hours of permitted operation within each 12-month period, the name, location, and design capacity of the exempt unit, the number of hours of operation permitted by the exemption, and the number of hours of actual operation. You must also report at the same time the amount of petroleum used by the unit and the total amount of petroleum used by all units in your system.

(e) *Periodic review.* ERA shall, from time to time, review this exemption and shall terminate it when it finds that there is available a supply of synthetic fuel suitable for use by the exempt powerplant.

(f) *Exercise of discretion by ERA.* ERA may refuse to grant this exemption to you if it determines that such grant would not be in the public interest or in accordance with the purposes of the Act, notwithstanding the fact that the evidence you have furnished to ERA in your exemption petition substantiates that your facility would otherwise be eligible to receive the exemption.

PART 504—EXISTING ELECTRIC POWERPLANTS [RESERVED]

PART 505—NEW MAJOR FUEL BURNING INSTALLATIONS

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Authority: Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 et seq.); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620 92 Stat. 3289 (42 U.S.C. 8301 et seq.); E.O. 12009, 42 FR 4267.

PART 505—NEW MAJOR FUEL BURNING INSTALLATIONS

Subpart A—Prohibitions

§ 505.1 Purpose and scope.

(a) *Purpose.* This subpart sets forth the statutory prohibitions imposed on new major fuel burning installations which are boilers and establishes the criteria and procedures ERA intends to employ in administering and implementing its authority to prohibit nonboilers from using petroleum or natural gas.

(b) *Scope.* The prohibitions set out in this subpart apply to all new major fuel burning installations, as defined in Part 500, except those granted an exemption under Subparts C and D of this Part. Any person who owns, controls, operates, rents or leases an installation is subject to the prohibitions imposed and the sanctions provided for by the Act or these regulations.

§ 505.2 Prohibitions.

(a) *Prohibition on the Use of Natural Gas or Petroleum as a Primary Energy Source in Boilers.* Section 202(a) of the Act prohibits, unless an exemption has been granted under Subparts C or D of this Part, the use of petroleum or natural gas as a primary energy source in any new installation consisting of a boiler.

(b) *Prohibition on the Use of Natural Gas or Petroleum as a Primary Energy Source in Nonboilers.* (1) Prohibition by Rule.

(i) ERA may prohibit, by issuance of a rule, certain categories of new major fuel burning installations, other than boilers, from the use of petroleum or natural gas as a primary energy source.

(ii) In such a rulemaking proceeding ERA will consider any special circumstances or characteristics of the category of nonboilers that would be prohibited from using natural gas or petroleum as a primary energy source. Factors to be considered include the overall technical feasibility of members of the category to burn an alternate fuel, as well as their size and their geographic location. ERA will consider all other circumstances, characteristics, and factors it deems relevant and appropriate which are brought to its attention.

(iii) Enforcement of a final rule under this subsection will be stayed while ERA is considering any petition filed in accordance with Subpart F of Part 501 for an exemption from the prohibition established by rule for that installation. For ERA to stay the rule as it pertains to your installation under the procedures outlined in Part 501 your petition must be filed within 60 days after publication of the final rule in the **Federal Register.** The stay will remain in effect pending judicial review of ERA's action upon your exemption petition.

(iv) No final rule will apply to an installation that—

(A) Has received an order containing a comparable prohibition;

(B) Was proposed to receive an order but did not because of a demonstration

that the installation qualified or would qualify for an exemption under the Act; or

(C) Has been granted an exemption in accordance with Subparts C and D;

(2) Prohibition by Order.

(i) ERA may prohibit, by order, the use of natural gas or petroleum as a primary energy source in a new major fuel burning installation consisting of a nonboiler, if that installation has not been identified as a member of a category subject to a final rule at the time of the issuance of the proposed order.

(ii) ERA may not issue a final order to your installation covered by this subsection if you can demonstrate that your installation is eligible for an exemption. However, if your installation is eligible only for a temporary exemption, ERA may issue you a final order that will take effect at the expiration of the temporary exemption.

(iii) If ERA may not issue a final order because your facility is eligible for a permanent exemption, or if the effective date of the order is delayed during the period that a temporary exemption is effective, ERA may take appropriate action to assure that you comply with the terms and conditions, if any, of the order granting the exemption.

(3)(i) ERA may not prohibit the use of petroleum or natural gas in your installation covered by this subsection if you began the acquisition or construction of the nonboiler installation before the date the proposed rule or proposed order containing the prohibition was published.

(ii) If you began acquisition or construction of the installation prior to the date of publication of the proposed rule or proposed order, ERA will consider your installation to be an "existing" installation for purposes of treatment under the Existing Major Fuel Burning Installations section (Title III, Subtitle A) of the Act.

Subpart B—General Requirements for Exemptions

§ 505.3 Purpose and scope.

This subpart establishes the general requirements necessary to qualify for either a temporary or permanent exemption from the prohibitions set out under this Part and establishes the methodology for calculating the cost of using an alternate fuel and the cost of using imported petroleum.

§ 505.4 Fuels decision report.

(a) Before ERA will accept a petition for either a temporary or permanent exemption under this Part, you must include as part of your petition a Fuels Decision report, as described in Part 502, unless you are requesting an exemption for emergency, retirement or peakload (new powerplants only) purposes. The Fuels Decision Report shall contain the analysis and documentation of the evidence required in support of the exemption request.

(b) Your petition may contain more than one exemption request. In this case, your petition would include one Fuel Decision Report which addresses your considerations and the appropriate forms for the exemptions you are requesting.

§ 505.5 Cost calculation for new installations.

(a) *General.*

(1) This calculation compares the cost of using alternate fuel to the cost of using imported petroleum. Its purpose is to provide ERA with a mechanism for deciding when noneconomic investments are acceptable in the best interests of the United States.

(2) The cost of using an alternate fuel in lieu of imported oil or gas as a primary energy source will be deemed to be substantially in excess of the cost to use imported petroleum where the ratio of the former to the latter is greater than the index set periodically by ERA.

(3) The index is currently 1.3. ERA will revise the index from time to time after public notice and time to comment. Revisions shall become effective for all ERA decisions after final publication; however, the relevant index for a specific petition will be the index in effect at the time the petition is submitted, or the index in effect at the time a decision is rendered, whichever is lower.

(4) The cost test takes into consideration cash outlays for capital investments and annual expenses, and the effect of depreciation and taxes on the cash flow. There are two comparative cost tests—a general cost test and a special cost test. You must demonstrate eligibility for a permanent exemption using the procedures specified in the general cost test (paragraph (b)). You must demonstrate eligibility for a temporary exemption using the procedures specified in the general cost test (paragraph (b)) or the special cost test (paragraph (c)).

(5) The general cost test differs from the special cost test with respect to the time period over which costs are calculated and the types of fuel consuming equipment being considered. When using the general cost test, the cost is computed for the useful life of the installation. When using the special cost test, the cost is computed only for the term of the exemption. In the general cost test, the proposed oil or natural gas installation consuming oil or natural gas is compared with an equivalent alternate fuel-capable installation of the same capacity consuming that alternate fuel. In the special cost test, an alternate fuel-capable installation consuming oil or natural gas is compared with an alternate fuel-capable installation consuming that alternate fuel.

(b) *Cost calculation—general cost test.*

(1) You may be eligible for a permanent exemption if you demonstrate that the cost of using an alternate fuel starting anytime within the first 10 years of operations will always substantially exceed the cost of using imported petroleum over the useful life of the unit. You will have to show that the cost of using an alternate fuel, starting in each of the first 10 years of operation and using oil or natural gas until the start of using an alternate fuel, substantially exceeds the cost of using only imported petroleum.

(2) ERA will not grant a permanent exemption if a temporary exemption is warranted. Therefore, if the cost computed with successive starting dates for alternate fuel use (for the first 10 years of operation) does not always substantially exceed the cost of using imported petroleum, you would only be eligible for a temporary exemption. The length of the temporary exemption would be the minimum period within which the cost of starting to use alternate fuel always substantially exceeds the cost of using imported petroleum. For example, if you plan to burn coal which cannot be obtained at a reasonable price for 2 years after the installation of the boiler designed to burn coal and oil, ERA may grant a temporary exemption and allow the burning of oil for 2 years.

(3) To conduct the test, you must use the equations that follow.

(i) Calculate the ratio (R) of the cost of using an alternate fuel to the cost of using imported petroleum with equation 1.

$$\text{EQ 1} \qquad R = \frac{\text{COST (ALTERNATE)}}{\text{COST (OIL)}}$$

(ii) Calculate the cost of using an alternate fuel and imported petroleum with equation 2.

EQ 2 $COST = I + \sum_{i=1}^{N} \frac{(OM_i + FL_i)(1 - t) - t(DPR_i)}{(1 + K)^i}$

(iii) Calculate the capital investment using equation 3.

EQ 3 $$I = \sum_{i=-g}^{N} \frac{I_i - ITC_i - S_i}{(1 + K)^i}$$

(4) The terms in equations 2 and 3 are defined as follows:

i—Year. Outlays before the plant becomes operational are future valued to the year before the plant becomes operational (year 0) and outlays after the plant becomes operational are present valued to the year before the plant becomes operational.

g—The number of years prior to the year before the plant becomes operational a cash outlay is made for capital investments or investment tax credit is used.

N—The useful life of the installation (see section d).

I_i—Yearly cash outlay (in dollars) from the year the outlays first occur to the last year of the installation's useful life for capital investments. (See section d for the equipment which must be included.)

OM_i—Annual cash outlay in year i (in dollars) for all operations and maintenance expenses except fuel (i.e., all non-capital and non-fuel cash outlays caused by putting the capital investments into service). May include labor, materials, insurance, taxes (except income taxes), etc. (see section d.)

t—Marginal income tax rate (see section d).

FL_i—Annual cash outlay for delivered fuel expenses (in dollars) in year i (see section d).

K—The discount rate expressed as a fraction (see section d).

DPR_i—Depreciation in year i (see section d).

S_i—Salvage value of capital investment (in dollars) in year i.

ITC_i—Federal investment tax credit resulting from capital investments used in year i (see section d).

(5) The step-by-step procedure that follows shows the comparisons that you must make. It outlines the equipment and fuel comparisons, as well as the time comparisons.

(i) Compute the cost (COST) of using an alternate fuel in an alternate fuel-capable installation throughout the useful life of the installation with equation 2.

(ii) Compute the cost (COST) of using oil or natural gas in an oil or natural gas-fired installation throughout the useful life of the installation with equation 2.

(iii) Compute the ratio (R) of the cost of using an alternate fuel throughout the useful life of the installation to the cost of using oil or natural gas throughout the useful life of the installation with equation 1. If the ratio (R) is equal to or less than 1.3, the index set by ERA, you are not eligible for a permanent or temporary exemption using the general cost test and need not complete the remainder of the calculation.

(iv) Compute the cost (COST) of using an alternate fuel in an alternate fuel and oil or natural gas-capable installation with equation 2 assuming an alternate fuel is not used as the primary energy source until the end of the first year of operation. All cash outlays should reflect postponed use of alternate fuel (e.g., installation of scrubber when used).

(v) Successively compute the cost (COST) of using an alternate fuel in an alternate fuel and oil or natural gas-capable installation with equation 2 assuming alternate fuel is postponed until the end of the second through tenth year of operation (and oil or natural gas is used in the years preceding alternate fuel use).

(vi) Compute the ratios (R) of the cost of using an alternate fuel successively at the end of the first through tenth year to the cost of using oil or natural gas throughout the life of the installation with equation 1.

(vii) If all the ratios (R) computed in C and F are greater than 1.3 (an index to be set periodically by ERA), your proposed installation would meet the cost criteria for a permanent exemption. If one or more of the ratios (R) is equal to or less than 1.3 and a series of ratios (R), starting with the case where alternate fuel is used from the start of operation, are all greater than 1.3, a temporary exemption would be granted for the minimum period in which the cost of starting to use alternate fuel, deferred year by year, always exceeds 1.3.

(6) The following table shows the hypothetical results of four sets of calculations assuming the index is 1.3:

Hypothetical Results of Four Sets of Calculations

Year in which alternate fuel use is commenced	Case I	Case II	Case III	Case IV
At Start of Operation				
1	1.4	1.6	1.5	1.1
2	1.5	1.7	1.5	1.2
3	1.3	1.6	1.4	1.2
4	1.3	1.5	1.3	1.1
5	1.2	1.5	1.4	1.1
6	1.2	1.4	1.4	1.1
7	1.1	1.4	1.5	1.1
8	1.1	1.4	1.5	1.1
9	1.0	1.4	1.6	1.1
10	1.0	1.4	1.6	1.1

The results of the above table show that: a 2-year temporary exemption would be granted in Case I, a permanent exemption would be granted in Case II, a 3-year temporary exemption would be granted in Case III, and no exemption would be granted in Case IV.

(c) *Cost calculation—special cost test.*

(1) You may be eligible for a temporary exemption if you demonstrate that the cost of using an alternate fuel in an alternate fuel-capable installation will substantially exceed the cost of using oil or natural gas in an alternate fuel-capable installation over the period of the proposed exemption. The period of the exemption cannot exceed 10 years. You will have to show that the cost of using an alternate fuel substantially exceeds the cost of using imported petroleum for the first year of operation, the first 2 years of operation, and successive first years of operation, up to the period of the proposed exemption. To do so, you must perform the calculations with successive ending dates to determine the maximum length of the exemption. ERA will limit the duration of a temporary exemption to the shortest time possible.

(2) To conduct the test, you must use the equations that follow.

(i) Calculate the ratio (R) of the cost of using an alternate fuel to the cost of using imported petroleum with equation 4.

EQ 4 $$R = \frac{\text{COST (ALTERNATE)}}{\text{COST (OIL)}}$$

(ii) Calculate the cost using equation 5.

EQ 5 $$\text{COST} = 1 \times \frac{\sum_{i=1}^{P} (1+K)^{-i}}{\sum_{i=1}^{N} (1+K)^{-i}} + \sum_{i=1}^{P} \frac{(OM_i + FL_i)(1-t) - t(DPR_i)}{(1+K)^i}$$

(3) The terms in equation 5 are the same as in equation 2 above with the addition of:

P—The length of the proposed temporary exemption.

(4) The step-by-step procedure that follows shows the comparisons you must make.

(i) Compute the cost (COST) of using an alternate fuel in an alternate fuel-capable installation assuming the length of the proposed exemption is 1 year with equation 5.

(ii) Compute the cost (COST) of using oil or natural gas in an alternate fuel and oil or natural gas-capable installation assuming the length of the proposed exemption is 1 year with equation 5.

(iii) Compute the ratio (R) of the cost of using an alternate fuel for the first year to the cost of using imported petroleum for the first year with equation 4.

(iv) Repeat the calculations made in A, B, and C above assuming the length of the proposed exemption is 2 years, 3 years, 4 years, and so on, up to the period of the proposed exemption.

(v) A temporary exemption would be granted when all the ratios (R) are greater than *1.3* (the index established by ERA).

(d) *Information on parameters used in the calculation.*

(1) All estimated expenditures, except natural gas and petroleum products, shall be expressed in real (uninflated) terms by using the prices in effect at the time the petition is submitted.

(2) The delivered price of oil or natural gas used in the calculation of delivered fuel expenses must reflect the price of imported oil.

(i) If you plan to use 100 percent domestic [15] petroleum product in your facility, compute your petroleum price with the following equation:

PFE=PF+PICO−PCCO

where

PICO=Price of imported crude oil. The most recent refiner acquisition cost of imported crude oil as reported in the **Federal Register** monthly notice for the DOE Domestic Crude Oil Allocation (Entitlements) Program.

PCCO=Price of composite crude oil. The most recent weighted average cost of total reported crude oil receipts as reported in the **Federal Register** notice for the DOE Entitlements Programs.

PF=Price of your fuel (f.o.b. your facility). The most recent actual weighted average cost of your fuel oil (other than natural gas). Alternatively, if no purchases of fuel oil occurred, or you used natural gas during that month, you should use a simple average of the industrial price of fuel oil (capable of being burned in your facility) sold in your area by at least three suppliers.

PFE=Price of fuel for use in the cost calculation.

(ii) If you plan to use 100 percent imported petroleum product in your facility, compute your petroleum price with the following equation:

PFE=PF+ENT

where

ENT=⅛×E_p ×DOSR for residual fuel oil if an entitlement has been received by the importer.

ENT=0 for all other products or if an entitlment has not been received by the importer.

E_p =entitlement price reported in the **Federal Register** monthly notice for the DOE Entitlements Program.

DOSR=national domestic oil supply ratio reported in the **Federal Register** monthly notice for the DOE Entitlements Program.

(iii) If you plan to use a combination of domestic and imported petroleum product in your facility, you may use the prices computed with the formula in (d)(2)(i) of this section or you may use a weighted average of the prices computed with the formulas in (d)(2) (i) and (ii) of this section.

(iv) If you plan to use natural gas in your facility, you must use the formula in (d)(2)(i) of this section and the price of #6 residual fuel oil, which meets the air quality standards in your area, as the price of fuel.

(3) Capital investments (I) must include all items which are capital investments for Federal income tax purposes. All purchased equipment which has a useful life greater than 1 year, capitalized engineering costs, land, construction, environmental offsets, fuel inventory, [16] piping, etc., that are required to be able to use the installation must be included. However, an item may only be included if a cash outlay is required after the decision has been made to build the installation. [17]

(4) The operating and maintenance expenses (OM_i) must reflect both fixed and variable components. The firm must specify how much the installation will be used (utilization factor) when computing the variable components.

(5) The fuel expenses (FL_i) depend on how much the installation is used. The firm must specify how much the installation will be used, at what firing rates and the amount of fuel that will be burned annually. If an exemption is granted, it will be conditioned, subject to penalties, upon the petitioner burning no more than the maximum amount of fuel he could have specified and still have been granted the exemption.

(6) The discount rate (K) is *7.7* percent. ERA will change the discount rate from time to time after public notice and an opportunity to comment. Revisions shall become effective after final publication; however, the relevant discount rate for a specific petition will be the discount rate in effect at the time the petition is submitted.

(7)(i) The useful life (N) of major fuel burning installations shall be 40 years. You may rebut this presumption with suitable engineering evidence.

(ii) If the installations being compared have different useful lives, you will have

[15] For the purpose of this regulation, the Virgin Islands, Puerto Rico, and the U.S. territories and possessions are domestic sources.

[16] For industrial boilers, the greater of: (1) 21 days fuel supply, or (2) sufficient fuel to fill 60 percent of the storage volume must be included.

[17] E.g. if in 1982 you are filing for an exemption to use petroleum in a (statutorily) new installation which became operational in 1981, you must include all the cost you have already disbursed as well as the cost you will disburse.

to modify your general cost test calculation so that the two cash flows being compared have the length of the longer useful life. To do this you must multiply the cost—computed with equation 2—of the facility with the shorter life by the following adjustment factor (A).

$$A = \frac{\sum_{i=1}^{O} (1+K)^{-i}}{\sum_{i=1}^{M} (1+K)^{-i}}$$

where

M=the useful life of the facility with the shorter life,

O=the useful life of the facility with the longer life, and

K=the discount rate

(8) All Federal investment tax credits (ITC) will be applied consistently throughout the analysis in a manner consistent with the Federal tax laws in effect at the time the petition is submitted.

(9) Depreciation (DPR) will be applied consistently throughout the analysis in a manner consistent with Federal tax laws in effect at the time the petition is submitted. In general, accelerated depreciation cannot be used for gas- or oil-fired boilers. For alternate fuel fired facilities you must use the most rapid depreciation permitted by law.

(10) The marginal income tax rate (t) is the firm's marginal Federal income tax rate for the year the petition is submitted.

(11) The design capacity of the installations being compared must be the same.

(12) All estimated expenditures will be computed in accordance with generally accepted accounting principles.

(e) *Evidence in support of the comparative cost test.*

All petitions for exemption requiring the use of the comparative cost test shall include, but not be limited to, the following information:

(1) A detailed accounting of all cash outlays, investment tax credits, and anticipated salvage for capital investments. Include a description and cost estimate of all major construction and equipment. All critical assumptions should be stated and sufficient data should be included to support your estimates.

(2) A detailed accounting of all annual cash outlays for fixed and variable operations and maintenance expenses including a description of all major elements and the formulas used to compute them. All critical assumptions should be stated and sufficient data included to support your estimates.

(3) A detailed accounting of all annual cash outlays for delivered fuel expenses including the formulas used to compute them. All critical assumptions should be stated and sufficient data included to support your estimates. The fuel price and characteristics for each alternate fuel should be included.

(4) If the useful life of the installation is judged to be less than 40 years, all critical assumptions and sufficient data to support that position.

(5) A detailed accounting of the depreciation for each capital asset including the depreciable base, tax life and methods used. All critical assumptions should be stated and sufficient data included to support your estimates.

(6) A detailed justification of utilization factor including: a summary of your historic use of similar equipment, a projection of future use, and a statement explaining why scheduling could not be modified to increase the utilization factor.

(f) *Example of calculations.* (1) The purpose of this example is solely to illustrate the mechanics of the cost tests; it should not be construed to be guidance on the application of the Federal income tax laws. The detail is only to the level of the individual terms in the cost test equations. Where the petitioner should supply a value, equations, and data, we have only supplied the value.

(2) We are assuming: (i) That you are profitable to the extent that your Federal marginal income tax rate is 46 percent and that you need not carry over investment tax credits, and (ii) that you use double declining balance switching over to straight line to depreciate alternate fuel fired facilities.

(3) You are planning to build a new major fuel burning installation and the fuels you are considering are coal and oil. In this particular situation, the delivery cost of coal is much greater for the first 3 years than it will be in the later years because of a transportation problem requiring 3 years to resolve. Do you qualify for an exemption? If so, is it permanent or temporary?

(4) To determine if you qualify for a permanent exemption, you would have to use the general cost test and compute the ratios of the cost to use (i) coal for the useful life of a coal-capable installation, (ii) oil for the first year and coal for the remainder of the useful life of a coal- and oil-capable installation, (iii) oil for the first 2 years and coal for the remainder of the useful life of a coal- and oil-capable installation, . . ., and (xi) oil for the first 10 years and coal for the remainder of the useful life of a coal- and oil-capable installation to the cost of using oil for the entire life of an oil-fired installation.

(5) All 11 ratios would have to be higher than, for purposes of this example, 1.3 in order to qualify for a permanent exemption. However, if a series of successive ratios, starting with the case where alternate fuel is used from the start of operation, are all greater than 1.3, you would be eligible for a temporary exemption up to the last year the ratio is greater than 1.3.

(6) In this example, we will only compute the ratios of (1) the cost to use coal for the useful life of a coal capable installation and (2) the cost to use oil for the first 3 years and coal for the remainder of the useful life of a coal- and oil-capable installation to the cost of using oil for the entire useful life of an oil-fired installation.

(7) To determine if you qualify for a temporary exemption, if you have not already done so with the general cost test, of 3 years, you would have to use the special cost test and compute the ratios of the cost to use coal in a coal-capable installation to the cost to use oil in a coal- and oil-capable installation for 1, 2, and 3 years. All three ratios would have to be higher than 1.3 in order to qualify for a 3 year temporary exemption. In this example, we will only compute the ratio of the cost to use coal in a coal-capable installation to the cost to use oil in a coal- and oil-capable installation for 3 years.

(8) *Parameters.* A set of hypothetical parameters are given below.

(i) 200,000,000 Btu/hr coal boiler—

(A) *Capital cash flow requirements.*

Year before boiler becomes operational, and	Cash flow
−3	$906,000
−2	3,622,000
−1	3,622,000
0	906,000
Total	9,055,000

(B) *Operations and maintenance expense cash requirements.*

Fixed	$1,449,000
Variable	540,000
Total	1,989,000

(C) *Fuel Expense Cash Requirements.*

First 3 years	$2,460,000
Fourth year through 40th year	1,640,000

(D) The plant is assumed to have a salvage value of zero.

(ii) 200,000,000 Btu/hr oil boiler—

(A) *Capital cash flow requirements.*

Year before boiler becomes operational, and Cash flow	
−1	$954,000
0	954,000
Total	1,908,000

(B) *Operations and maintenance expense cash requirements.*

Fixed	$371,000
Variable	100,000
Total	471,000

(C) *Fuel Expense Cash Requirements.*

First through 40th year	$2,742,000

(D) The plant is assumed to have a salvage value of zero.

(iii) 200,000,000 Btu/Hr oil- and coal-fired boiler—

(A) *Capital cash flow requirements.*

(*1*) The cash flows required to build the basic boiler and make it oil capable are:

Year before boiler becomes operational, and Cash flow	
−3	$934,000
−2	3,734,000
−1	3,734,000
0	934,000
Total	9,336,000

(*2*) The additional cash flows required to make the plant coal-capable are:

Year before boiler becomes operational, and Cash flow	
−1	$314,000
0	906,000
Total	1,220,000

(B) *Operations and maintenance expense cash requirements.*

(*1*) When burning oil—

Fixed	$371,000
Variable	100,000
Total	471,000

(*2*) When burning coal—

Fixed	$1,449,000
Variable	540,000
Total	1,989,000

(C) *Fuel expense cash requirements.*

(*1*) When burning oil—

First through 40th year	$2,742,000

(*2*) When burning coal—

First 3 years	$2,460,000
Fourth through 40th	1,640,000

(D) The plant is assumed to have a salvage value of zero and it is assumed that the oil capability will not be scrapped after 3 years but maintained in case of emergency.

(iv) The discount rate for the purpose of this example is 8 percent.

(9) *Analysis.*[18]

(i) *General cost test.*

(A) Compute the cost of using coal in a coal-fired boiler from the start of the operation.

[18] All dollars are in thousands.

$$I = \sum_{i=-g}^{N} \frac{I_i - ITC_i - S_i}{(1+K)^i}$$

$$= \frac{906}{(1.08)^{-3}} + \frac{3,622}{(1.08)^{-2}}$$

$$+ \frac{3,622}{(1.08)^{-1}} + \frac{906}{(1.08)^{0}}$$

$$- \frac{0.10 \times 9,055}{(1.08)} \quad \underline{1/}$$

$$I = 9,345$$

$$COST = I + \sum_{i=1}^{N} \frac{(OM_i + FL_i)\ (1-t) - t.DPR_i}{(1+K)^i}$$

[1]ITC is recognized the year boiler is put into operation.

$$= 9,345 + \sum_{i=1}^{3} \frac{(1,989 + 2,460)\ (1 - 0.46)}{(1.08)^i}$$

$$+ \sum_{i=4}^{40} \frac{(1.989 + 1,640)\ (1 - 0.46)}{(1.08)^i}$$

$$- \sum_{i=1}^{23} \frac{0.46 \times DPR_i}{(1.08)^i} \quad \underline{1/}$$

$$= 31,614$$

[1]Depreciation is double declining balance switching over to straight line. The tax life is 23 years for the boiler.

(B) Compute the cost of using oil in an oil-fired boiler throughout the useful life of the boiler.

$$I = \sum_{i=-g}^{N} \frac{I_i - ITC_i^{1/} - S_i}{(1+K)^i}$$

$$= \frac{954}{(1.08)^{-1}} + \frac{954}{(1.08)^0}$$

$$= 1{,}984$$

$$COST = I + \sum_{i=1}^{N} \frac{(OM_i + FL_i)(1-t) - t.DPR_i}{(1+K)^i}$$

$$= 1{,}984 + \sum_{i=1}^{40} \frac{(471 + 2{,}742)(1 - 0.46)}{(1.08)^i}$$

$$- \sum_{i=1}^{23} \frac{0.46 \times DPR_i^{2/}}{(1.08)^i}$$

$$= 22{,}278$$

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[1] ITC is not allowed on the boiler.

[2] Depreciation is straight line. The tax life is 23 years for the boiler

(C) Compute the ratio of the cost of using coal from the beginning of the operation to the cost of using oil throughout the useful life of the boiler.

$$R = \frac{\text{COST (COAL)}}{\text{COST (OIL)}}$$

$$= \frac{31,614}{22,278}$$

$$= 1.42$$

Since the ratio (R) is greater than 1.3 you may be eligible for an exemption and should complete the calculation.

(D) Compute the cost of using coal in a coal- and oil-capable boiler, assuming coal is not used until after the third year and oil is used for the first 3 years of operation.

$$I = \sum_{i=-3}^{N} \frac{I_i - ITC_i - S_i}{(1+K)^i}$$

$$= \frac{934}{(1.08)^{-3}} + \frac{3,734}{(1.08)^{-2}}$$

$$+ \frac{3,734}{(1.08)^{-1}} + \frac{934}{(1.08)^{0}}$$

$$- \frac{0.10 \times 9,336^{1/}}{(1.08)^{1}}$$

$$+ \frac{314}{(1.08)^{2}} + \frac{906}{(1.08)^{3}}$$

$$- \frac{0.10 \times 1.220^{2/}}{(1.08)^{4}}$$

$$I = 10,533$$

$$COST = I + \sum_{i=1}^{N} \frac{(OM_i + FL_i)(1-t) - t.DPR_i}{(1+K)^i}$$

$$= 10,533$$

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[1] ITC is recognized the year the boiler is put into operation.

[2] ITC is recognized the year after the boiler becomes coal capable.

$$+ \sum_{i=1}^{3} \frac{(471 + 2,742)(1 - 0.46)}{(1.08)^i}$$

$$+ \sum_{i=4}^{40} \frac{(1,989 + 1,640)(1 - 0.46)}{(1.08)^i}$$

$$- \sum_{i=1}^{23} \frac{0.46 \times DPR_i^{1/}}{(1.08)^i} - \sum_{i=4}^{26} \frac{0.46 \times DPR_i^{2/}}{(1.08)^i}$$

$$COST = 30,772$$

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[1] This term accounts for the initial investment required to make the boiler oil capable. The depreciation method is double declining balance switching to straight line. The tax life is 23 years.

[2] This term accounts for the additional investment required to make the boiler coal capable. The depreciation method is double declining switching to straight line. The tax life is 23 years.

(E) Compute the ratio of the cost of using coal starting at the end of the third year to the cost of using oil throughout the life of the boiler.

$$R = \frac{\text{COST (COAL)}}{\text{COST (OIL)}}$$

$$= \frac{30,772}{22,278}$$

$$= 1.38$$

This ratio and the ratio computed in (f)(9)(i)(C) of this section are higher than the index set by ERA. If all the ratios, including the nine other ratios not computed in this example, are higher than 1.3, you would be eligible for a permanent exemption. If all the ratios are not greater than 1.3 and a series of ratios, starting with the case computed in (f)(9)(i)(C) of this section, are higher than 1.3, a temporary exemption would be granted for the minimum period in which the ratios always exceed 1.3.

(ii) Special cost test.

(A) Compute the cost of using coal in a coal boiler assuming the length of the exemption is 3 years.

$$\text{COST} = I \times \frac{\sum_{i=1}^{P} (1+K)^{-i}}{\sum_{i=1}^{N} (1+K)^{-i}} + \sum_{i=1}^{P} \frac{(OM_i + FL_i)(1-t) - t(DPR_i)}{(1+K)^i}$$

$$= 9,345 \times \frac{\sum_{i=1}^{3} (1.08)^{-i}}{\sum_{i=1}^{40} (1.08)^{-i}} + \sum_{i=1}^{3} \frac{(1,989 + 2,460)(1-0.46)}{(1.08)^i} - \sum_{i=1}^{3} \frac{0.46 \times DPR_i \text{ [1]}}{(1.08)^i}$$

$$= 7,352$$

(B) Compute the cost of using oil in a coal and oil boiler assuming the exemption is 3 years.

$$\text{COST} = I \times \frac{\sum_{i=1}^{P} (1+K)^{-i}}{\sum_{i=1}^{N} (1+K)^{-i}} + \sum_{i=1}^{P} \frac{(OM_i + FL_i)(1-t) - t(DPR_i)}{(1+K)^i}$$

$$= 10,533 \times \frac{\sum_{i=1}^{3} (1.08)^{-i}}{\sum_{i=1}^{40} (1.08)^{i}} + \sum_{i=1}^{3} \frac{(471 + 2,742)(1-0.46)}{(1.08)^i} - \sum_{i=1}^{3} \frac{0.46 \times DPR_i \text{ [2]}}{(1.08)^i}$$

$$= 5,862$$

---

[1] Depreciation is double declining balance switching to straight line. The tax life is 23 years for the entire boiler.

[2] This term accounts for the initial investment required to make the boiler oil capable. It does not reflect the additional investment necessary to burn coal. The depreciation method is double declining balance switching to straight line. The tax life is 23 years.

(C) Compute the ratio of the cost of using coal to the cost of using oil.

$$R = \frac{\text{COST (COAL)}}{\text{COST (OIL)}}$$

$$= \frac{7,352}{5,862}$$

$$= 1.25$$

This ratio (R) is lower than 1.3. You would not receive a temporary exemption of three years. However, if the ratio computed where the use of coal is delayed one and two years are higher than 1.3, you would get a temporary exemption of two years.

§ 505.6 [Reserved]

§ 505.7 Use of mixtures—General requirement for permanent exemptions.

(a) *Application:* ERA will consider a petition for any of the following exemptions provided for in Section 212 of the Act (lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, state or local requirements, cogeneration, emergency purposes, product/process, or equipment outages) to be incomplete, inadequate, or unacceptable for filing unless you demonstate to the satisfaction of ERA that you have considered the use of a mixture(s) for which an exemption under § 505.28 (Fuel mixtures) of these regulations would be available.

(b) *Demonstration.* ERA will deny petitions for any of the exemptions listed above unless you demonstrate that use of such a mixture(s) is not economically or technically feasible in the unit for which you are requesting an exemption. You must submit to ERA in your Fuels Decision Report (or in your petition for an emergency or peakload exemption) at least the following evidence in order to make the demonstration required by this section:

(1) If use of a mixture(s) were required, you would be eligible for one of the following permanent exemptions provided for in the Act: lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, or state or local requirements; or

(2) Use of a mixture(s) is not technically or economically feasible in your specific unit due to design or special circumstances.

§ 505.8 Use of fluidized bed combustion not feasible—General requirement for permanent exemptions.

(a) *ERA finding.* ERA may deny any of the following permanent exemptions provided for in Section 212 of the Act (lack of alternate fuel supply, site limitations, environmental requirements, inability to obtain adequate capital, state or local requirements, cogeneration, emergency purposes, product/process, or equipment outages), if ERA finds on a site-specific or generic basis that use of a method of fluidized bed combustion of an alternate fuel is economically and technically feasible.

(b) *Demonstration.* If ERA has made such a finding, ERA will deny your request for exemption unless you demonstrate that the use of a method of fluidized bed combustion is not economically or technically feasible. You must include in your Fuels Decision Report or any supplement thereto required by ERA (or in your petition for an emergency or peakload exemption) at least the following evidence:

(1) If use of a method of fluidized bed combustion were required, you would be

eligible for one of the following permanent exemptions provided for in Section 212 of the Act: lack of alternate fuel supply, site limitations, environmental requirements, inability to raise adequate capital, or state and local requirements; or

(2) Use of a method of fluidized bed combustion is not technically or economically feasible in your specific unit due to design or special circumstances.

§ 505.9 Terms and conditions; compliance plans.

(a) *Terms and Conditions generally.* You must comply with the terms and conditions of an exemption granted under the Act by ERA, including terms and conditions requiring use of effective fuel conservation measures.

(b) *Compliance plans for temporary exemptions.*

(1) A compliance plan certified by your duly authorized representative must accompany each petition for a temporary exemption. The compliance plan shall include at least the following:

(i) A specific schedule of milestones indicating how you will comply with the applicable prohibitions of the Act;

(ii) Evidence of binding contracts for fuel, or facilities for the production of fuel, which are needed to comply with the applicable prohibitions of the Act; and

(iii) Any other documentary evidence which indicates your ability to comply with the applicable prohibitions of the Act.

(2) The exemption shall not be effective until the compliance plan is approved by ERA.

(3) *Revisions of compliance plans.* If the petition is granted, you must submit to ERA an updated compliance plan certified by your duly authorized representative:

(i) At the end of each 12-month period from the effective date of the exemption;

(ii) Within 1 month of an alteration of any milestone in the compliance plan, together with the reasons for the alteration and its impact upon the scheduling of all other milestones in the plan; and

(iii) At any time ERA, in its discretion, determines that a revised compliance plan may be necessary to reflect changes in circumstances.

(c) *Enforcement.* Any exemption is subject to termination upon the violation of any provision of the exemption or any provision of the pertinent compliance plan.

Subpart C—Temporary Exemptions for New Major Fuel Burning Installations

§ 505.10 Purpose and scope.

(a) This subpart implements the provisions contained in Section 211 of the Act with regard to temporary exemptions for new installations.

(b) This subpart establishes the criteria and standards which owners or operators of new installations who petition for a temporary exemption must meet to sustain their burden of proof under the Act.

(c) All petitions for temporary exemptions for new installations must be submitted in accordance with the procedures set out in Part 501 of these regulations.

(d) The duration of any temporary exemption granted under this subpart shall be measured from the date the installation is placed in service.

§ 505.11 Lack of alternate fuel supply.

(a) *Eligibility.* Section 211(a)(1) of the Act provides for a temporary exemption due to the unavailability of an adequate and reliable supply of an alternate fuel supply. To qualify you must demonstrate to the satisfaction of ERA that:

(1) You made a good faith effort to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the new installation;

(2) For the period of the proposed exemption, the cost of using such a supply would substantially exceed the cost of using imported petroleum as a primary energy source as defined in § 505.5 (Cost Calculation) of these regulations; and

(3) You will be able to comply with the applicable prohibitions of these regulations at the end of the proposed exemption period.

(b) *Evidence required in support of a petition.* You must include at least the following evidence in order to make the demonstration required by this section:

(1) A description of your analysis of the alternate fuels you considered for use;

(2) A description of the alternate unit designs you considered in a good faith effort to comply with the applicable prohibitions;

(3) A description of the detailed design requirements you specified for the new installation, including capacity, alternate fuel capability, and all other specifications;

(4) A description of the range of specific fuel characteristics of all the

fuels which can be used by the new installation;

(5) Evidence that you sought to obtain the full range of alternate fuels which could be used by the new installation, including bid requests and/or advertisements for supply contracts and responses thereto, as well as any other arrangements you attempted to make to secure supplies; and

(6) Evidence of the contracts or other arrangements you have made to insure a reliable and adequate supply of an alternate fuel at the end of the proposed exemption.

(7) All data required by § 505.8 (Cost Calculation) necessary for computing the cost calculation formula.

(c) *Compliance Plan.* You must submit to ERA a compliance plan in accord with § 505.9 of these regulations simultaneously with submission of your petition. You must submit an updated compliance plan, if applicable, as required by § 505.9 of these regulations or as may be required by the terms of any order granting an exemption under this subpart.

(d) Duration. This temporary exemption, taking into account any extensions or renewals, may not exceed 10 years.

§ 505.12 Site limitations.

(a) *Eligibility.* Section 211(a)(2) of the Act provides for a temporary exemption due to a site limitation. To qualify for such an exemption you must demonstrate that one or more of the following specific physical limitations relevant to the location or operation of your installation exist which, despite your diligent good faith efforts, cannot be overcome before the end of the proposed exemption period:

(1) Alternate fuels would be inaccessible as a result of a specific physical limitation;

(2) Transportation facilities for alternate fuels would be unavailable;

(3) Adequate land or facilities for handling, using or storing an alternate fuel would be unavailable;

(4) Adequate means for controlling and disposing of wastes would be unavailable;

(5) Adequate and reliable supply of water would be unavailable; or

(6) Other site limitations exist which would not permit the location or operation of the proposed installation using an alternate fuel.

(b) *Evidence required in support of the petition.* You must include at least the following evidence in order to make the demonstration required by this section:

(1) Evidence that the site limitation is a physical limitation, and not a requirement of a Federal, state, or local law which could be the basis of an exemption under § 505.26 (State or local requirements);

(2) Evidence that alternate means of overcoming the specific site limitations were considered, with a detailed description of the efforts made to overcome the site limitations set out in your petition;

(3) Evidence of the equipment or space requirement for which the site limitation is claimed;

(4) Evidence of the contracts or other arrangements you have made to insure that the site limitation will be overcome and that you will be able to comply with the prohibitions at the end of the proposed exemption period. Examples of evidence relevant to establishing a site limitation for purposes of a temporary exemption are as follows:

(i) Detailed documentation of impediments, including right of way problems, site diagrams, maps of the surrounding areas and other items essential to the showing of a site limitations;

(ii) Identification of transportation facilities relevant to the specific site and a demonstration why existing transportation facilities cannot be utilized or new facilities constructed;

(iii) Copies of bid requests, advertisements and general efforts made to secure alternative transportation facilities;

(iv) Identification of potential alternate fuel storage locations within a reasonable geographic area surrounding the proposed installation;

(v) Detailed site plans of the entire facility including those areas not directly involved with the specific installation;

(vi) A specific listing of all equipment necessary and not currently available to properly handle alternate fuel;

(vii) Copies of bid requests, advertisements and general efforts made to secure alternative fuel storage facilties;

(viii) Copies of quotes from bona fide suppliers, indicating leadtimes for purchase and installation of required ancillary storage or handling equipment;

(ix) Specific listing of any equipment necessary and not currently available to properly control and dispose of waste;

(x) Identification of potential alternate waste disposal locations within a reasonable geographic area surrounding the proposed installation;

(xi) A description of efforts made to secure offsite disposal areas, including the cost of acquisition of the sites, transportation facilities and waste handling costs involved in their use; and

(xii) Copies of bid requests, advertisements, and general efforts made to secure waste control and disposal equipment.

(c) *Compliance Plan.* You must submit to ERA simultaneously with your petition a compliance plan in accordance with §505.9 of these regulations. You must submit an updated compliance plan, if applicable, as required by §505.9 of these regulations and as may be required by the terms of any order granting an exemption under this subpart.

(d) *Duration.* This temporary exemption, taking into account any extensions and renewals, may not exceed 5 years.

§505.13 Inability to comply with applicable environmental requirements.

(a) *Eligibility.* Section 211(a)(3) of the Act provides for a temporary exemption due to an inability to comply with applicable environmental requirements. To qualify you must demonstrate to the satisfaction of the ERA that, despite diligent good faith efforts:

(1) You will be unable to comply with the applicable prohibitions imposed by the Act without violating applicable Federal or State environmental requirements as of the projected date of commencement of operation; and

(2) You will be able to comply with the applicable prohibitions imposed by the Act by the end of the temporary exemption period.

(b) *Criteria.* ERA's decision with regard to environmental compliance will be based solely on an analysis of your capacity to physically achieve applicable environmental requirements. You should direct your analysis toward those conditions or circumstances which make it physically impossible for you to comply with applicable environmental requirements during the temporary exemption period. Cost of compliance shall not enter into the analysis, but any cost-related considerations may be presented as part of a demonstration submitted under §505.11.

(c) *Evidence required in support of the petition.* You must submit at least the following evidence to corroborate the above requirements:

(1) If you elect to seek a construction permit from EPA or an appropriate State agency prior to petitioning for an exemption from ERA, a copy of your application and a detailed synopsis of all supporting documents filed with or subsequent to your application to EPA or the appropriate State agency;

(2) To the extent applicable, a copy of the EPA or State denial of your construction permit application;

(3) To the extent applicable, a detailed synopsis of the administrative record of the EPA or State or local permit proceedings;

(4) To the extent applicable, an analysis of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which would provide the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of the ability to meet applicable standards and criteria when using both the proposed fuel and all alternate fuels for which you are requesting an environmental exemption. All conclusions regarding the ability of the facility to comply must be based on accepted analytical techniques, such as air quality modeling, and must reflect current conditions of the area which would be affected by the facility. You are responsible for performing the necessary sampling and collecting sufficient data to accurately characterize these conditions. Environmental compliance must be examined in the context of the available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain requests for bids and other inquiries made and responses received by you concerning the availability and performance of pollution control equipment; contracts signed, if any, for an alternate fuel supply and for the purchase and installation of pollution control equipment; or other comparable evidence such as technical studies documenting efficacy of equipment to meet applicable requirements; and

(6) An examination of the regulatory options available to you in seeking to achieve environmental compliance. This examination must include an analysis of the availability of offsets, if needed, and the potential for securing variances and State Implementation Plan revisions, as appropriate. The analysis must illustrate and document your efforts, if any, to locate, identify, and acquire offsets, including agreements made by you with the State or other companies for acquisition of offsets. If an agreement to acquire offsets is conditioned upon the grant of a variance, or State Implementation Plan revision, you must submit a letter from the State agency indicating when a proceeding to effectuate the agreement will take place. The analysis must contain any correspondence initiated or received by you concerning these regulatory options and all technical studies you have relied upon to support your conclusions.

(7) In addition, you may submit any other documentation you believe demonstrates an inability to comply with applicable environmental requirements despite diligent good faith efforts.

(d) *Compliance Plan.* You must submit to ERA a compliance plan in accordance with § 505.9 of these regulations simultaneously with the submission of your petition. An updated compliance plan as required by § 505.9 of these regulations and as may be required by the terms of any order granting an exemption under this subpart must also be submitted as applicable.

(e) *Other Actions.*

(1) Prior to deciding to submit an exemption application, it is recommended that you request a meeting with ERA and EPA or the appropriate State or local regulatory agency to discuss options for operating an alternate fuel-fired facility in compliance with applicable environmental requirements; and

(2) You must submit a copy to ERA of your application for a construction permit at the same time you submit it to EPA or the state agency.

(f) *Duration.* This temporary exemption, taking into account extensions and renewals, may not exceed five years, and will be issued by ERA for such time period up to and including five years as the petition demonstrates is necessary.

§ 505.14 Future use of synthetic fuels.

(a) *Eligibility.* Section 211(b) of the Act provides for a temporary exemption based upon the future use of synthetic fuels. To qualify you must demonstrate to the satisfaction of ERA that;

(1) You will be able to comply with the applicable prohibitions imposed by the Act by the end of the proposed exemption period by the use of synthetic fuel as a primary energy source in your powerplant;

(2) You will not be capable of complying with the applicable prohibitions imposed by the Act by using a synthetic fuel in your powerplant before the end of the proposed exemption period.

(b) *Evidence required in support of the petition.* You must include in your Fuels Decision Report at least the following evidence in order to make a demonstration required by this Section:

(1) Copies of economic and technical feasibility studies pertaining to the use of synthetic fuels by your proposed powerplants;

(2) Reliable evidence of the financial commitments you have made to construct, operate and maintain equipment which will use synthetic fuel as the primary energy source at the end of the proposed exemption period;

(3) Copies of bid requests, advertisements, contracts and/or other agreements relating to the production, purchase and transportation of synthetic fuel; and

(4) Information with regard to permits that may be required by Federal or state agencies for the construction and operation of a powerplant using synthetic fuels.

(c) *Compliance plan.* You must submit to ERA a compliance plan in accordance with Section 214 of the Act and § 503.12 of these regulations simultaneously with submission of your petition to satisfy ERA requirements for petition adequacy. You shall submit an updated complaince plan as required by § 503.12 of these regulations and as required by the terms of any order granting an exemption under this subpart.

(d) *Duration.* This temporary exemption may be granted for a period of up to 5 years and may be extended for up to an additional 5 years, but so extended, may not exceed 10 years.

§ 505.15 Public interest exemption.

(a) *Policy Note.* The use of coal and other alternate fuels in lieu of petroleum and natural gas is in the public interest. ERA will grant this temporary exemption where you are unable to comply immediately with the prohibitions of the Act, where the granting of the petition would be in the public interest, and where you will be in compliance with the prohibitions imposed by the Act at the end of the exemption period. In filing your petition, you are required to complete the portions of the Fuels Decision Report (FDR) specified in § 502 of these Interim Rules and demonstrate why your proposed facility could not burn a fuel mixture during the time the exemption is in effect. ERA recognizes, however, that there are situations where the public interest would best be served by not requiring the FDR and mixture demonstration; consequently, ERA strongly urges you to request a prepetition conference where, after a consideration of the facts of your case, ERA could waive all or part of these requirements. As an example, ERA will generally waive these requirements where you temporarily need the use of a natural gas- or petroleum-fired rental unit to provide steam until the ongoing

construction of an alternate fuel-fired unit is completed.

(b) *Eligibility.* Section 211(c) of the Act provides for a temporary public interest exemption. To qualify, you must demonstrate to the satisfaction of ERA that:

(1) You are unable to comply with the applicable prohibitions imposed by the Act, except in extraordinary circumstances, during the period for which the exemption is requested, but that you will be capable of complying at the end of the proposed exemption period; and

(2) The granting of the petition would be in accord with the purposes of the Act and would be in the public interest.

(c) *Evidence Required in Support of the Petition.* You must include at least the following evidence in order to make the demonstration required by this Section:

(1) substantial evidence to corroborate the eligibility requirements identified above;

(2) a demonstration that the use of a mixture, for which an exemption under § 505.28 (Fuel Mixtures) would be available, is not technically or economically feasible during the period the temporary public interest exemption is in effect; and

(3) Information and data required by §§ 502.4 (Introduction), 502.7 (Evidence for Exemption Requested), and 502.12 (Conservation Measures) of the Fuels Decision Report as set out in Part 502.

(d) *Compliance Plan.* You must submit to ERA a compliance plan in accordance with § 505.9 of these regulations simultaneously with submission of your petition. You must submit, if applicable, an updated compliance plan as required by § 505.9 of these regulations and as may be required by the terms of any order granting an exemption under this subpart.

(e) *Duration.* This temporary exemption, taking into account extension and renewals, may not exceed 5 years.

Subpart D—Permanent Exemptions for New MFBI's

§ 505.20 Purpose and scope.

(a) This subpart implements the provisions contained in Section 211 of the Act with regard to permanent exemptions for new major fuel burning installations and establishes the criteria and standards which owners or operators of new installations who petition for a permanent exemption must meet to sustain their burden of proof.

(b) If a petition for a permanent exemption is filed pursuant to § 505.21 (Lack of Alternate Fuel Supply for the First 10 Years of Useful Life); § 505.22 (Lack of Alternate Fuel Supply at a Cost Which Does Not Substantially Exceed the Cost of Using Imported Petroleum);§ 505.23 (Site Limitations); § 505.24 (Inability to Comply with Applicable Environmental Requirements); § 505.25 (Inability to Obtain Adequate Capital); or § 505.26 (State or Local Requirements), you must demonstrate in your Fuels Decision Report that your inability to use each reasonable alternate fuel would entitle you to one or more of the above exemptions.

(c) All petitions for permanent exemptions for new installations must be submitted in accordance with the procedures set out in Part 501 of these regulations.

§ 505.21 Lack of alternate fuel supply for the first 10 years of useful life.

(a) *Eligibility.* Section 212(a)(1)(A)(i) of the Act provides for a permanent exemption due to the lack of an adequate and reliable supply of alternate fuel within the first 10 years of the useful life of the new installation To qualify you must demonstrate to the satisfaction of ERA that:

(1) You made a good faith effort to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with the design and operational requirements of the new installation; and

(2) Such a supply is not likely to be available within the first 10 years of the useful life of the new installation.

(b) *Evidence required in support of the petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section.

(1) A description of the alternate unit designs you considered in a good faith effort to comply with the applicable prohibitions.

(2) A description of the detailed design requirements you specified for the new installation, including capacity, alternate fuels capability, and all other pertinent specifications.

(3) A description of the range of specific fuel characteristics of all the fuels which can be used by the new installation;

(4) Evidence that you sought to obtain the full range of alternate fuels which could be used by the new installations;

(5) Evidence that you solicited at least 5 bids from suppliers who could reasonable be expected to supply an adequate and reliable supply of the quantity and quality of alternate fuel needed, including bid requests and/or advertisements for supply contracts and all proposals or responses thereto, as well as any other arrangements you attempted to make to secure supplies;

(6) A description of your analysis of the alternate fuel you considered, including a discussion of how you made your assessment that an adequate and reliable supply of the quality of fuel needed would not be available within the first 10 years of useful life of the new installation.

§ 505.22 Lack of alternate fuel supply at a cost which substantially exceeds the cost of using imported petroleum.

(a) *Eligibility.* Section 212(a)(1)(A)(ii) of the Act provides for a permanent exemption due to the lack of an alternate fuel supply at a cost which substantially exceeds the cost of using imported oil. To qualify you must demonstrate to the satisfaction of ERA that:

(1) You made a good faith effort to obtain an adequate and reliable supply of an alternate fuel for use as a primary energy source of the quality and quantity necessary to conform with design and operational requirements of the new installation; and

(2) The cost of using such a supply would substantially exceed the cost of using imported petroleum as a primary energy source, as defined in § 505.5 (Cost Calculation) of these regulations during the useful life of the new installation.

(b) *Evidence required in support of the petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) A description of the alternate unit designs you considered in a good faith effort to comply with the applicable prohibitions.

(2) A description of the detailed design requirements you specified for the new installation, including capacity, alternate fuels capability, and all other pertinent specifications.

(3) A description of the range of specific fuel characteristics of all of the fuels which can be used by the new installation;

(4) Evidence that you sought the full range of alternate fuels which could be used by the new installation. including bid requests, and/or advertisements for supply contracts, all responses you received, as well as any other arrangements you attempted to make to secure supplies;

(5) All data required by § 505.5 of these regulations (Cost Calculation)

necessary for computing the cost calculation formula; and

(6) A description of your analysis of the alternate fuels you considered.

§ 505.23 Site limitations.

(a) *Eligibility.* Section 211(a)(2) of the Act provides for a permanent exemption because of a site limitation. To qualify you must demonstrate to the satisfaction of the ERA that, despite good faith efforts:

(1) Alternate fuels would be inaccessible to the location or operation of the proposed installation as a result of a specific physical limitation;

(2) Transportation facilities for alternate fuels would be unavailable;

(3) Adequate land or facilities for handling, using or storing alternate fuels would be unavailable;

(4) Adequate means for controlling and disposing of wastes would be unavailable;

(5) An adequate and reliable supply of water would be unavailable; or

(6) Other site limitations exist which would not permit the location or operation of the proposed installation using an alternate fuel and that these limitations cannot be reasonably expected to be overcome within 5 years after the commencement of operations.

(b) *Evidence required in support of the petition.* You must include at least the following evidence in order to make the demonstration required by this section:

(1) Evidence that the site limitation is a physical limitation, and not a requirement of a Federal, state, or local law which could be the basis of an exemption under § 505.26 (State or local requirements);

(2) Evidence that alternate means for overcoming the specific site limitations were sought, with a detailed description of the efforts made to overcome the site limitations set out in your petition; and

(3) Evidence of necessary equipment or space requirements for which the site limitation is claimed. Examples of evidence relevant to establishing a site limitation for purposes of a permanent exemption are as follows:

(i) Detailed documentation of impediments, including right-of-way problems, site diagrams, maps of the surrounding areas and other items essential to the showing of a site limitation;

(ii) Identification of transportation facilities relevant to the geographic site of the installation and a demonstration showing why existing transportation facilities cannot be utilized or new facilities constructed;

(iii) Copies of bid requests, advertisements and general efforts made to secure alternate transportation facilities;

(iv) Identification of potential alternate fuel storage locations within a reasonable geographic area surrounding the proposed installation;

(v) Detailed site plans of the entire facility which include those areas not directly involved with the specific installation;

(vi) A specific listing of all equipment necessary and not currently available to properly handle alternate fuels;

(vii) Copies of bid requests, advertisements and general efforts made to secure alternate storage facilities;

(viii) Copies of quotes from bona fide suppliers, indicating leadtimes for purchase and installation of required ancillary storage or handling equipment;

(ix) Specific listing of any equipment necessary and not currently available to properly control and dispose of wast;

(x) Identification of potential alternate waste disposal locations within a reasonable geographic area surrounding the proposed powerplant;

(xi) A description of efforts made to secure offsite disposal areas, transportation facilities and waste handling costs involved in their use; and

(xii) Copies of bid requests, advertisements, and general efforts made to secure waste control and disposal equipment.

§ 505.24 Inability to comply with applicable environmental requirements.

(a) *Eligibility.* Section 212(a)(1)(C) of the Act provides for a permanent exemption due to inability to comply with applicable environmental requirements. To qualify you must demonstrate to the satisfaction of ERA that, despite good faith efforts, you cannot burn alternate fuel without violating applicable environmental requirements within 5 years after the projected date of commencement of operation. ERA's decision with regard to compliance will be based solely on an analysis of your capacity to physically achieve applicable environmental requirements. The cost of compliance shall not enter into the analysis, but any cost-related considerations may be presented as part of a demonstration submitted under § 505.22.

(b) *Evidence supporting petition.* You must include at least the following evidence in order to make the demonstration required by this section:

(1) If you elect to seek a construction permit from EPA or an appropriate state agency prior to petitioning for an exemption from ERA, a copy of your application and a detailed synopsis of all supporting documents filed with or subsequent to your application to EPA or the appropriate state agency.

(2) To the extent applicable, a copy of the EPA or state denial of your construction permit application;

(3) To the extent applicable, a detailed synopsis of the administrative record of the EPA or state or local permit proceedings;

(4) To the extent applicable, an analysis of the technology upon which the denial was based, including a performance comparison between the proposed technology and that technology which would provide the maximum possible reduction of pollution;

(5) An examination of the environmental compliance of the facility, including an analysis of the ability to meet applicable standards and criteria when using both the proposed fuel and all alternative fuels for which you are requesting an environmental exemption. All conclusions regarding the ability of the facility to comply must be based on accepted analytical techniques, such as air quality modeling, and must reflect current conditions of the area which would be affected by the facility. You are responsible for performing the necessary sampling and collecting sufficient data to accurately characterize these conditions. Environmental compliance must be examined in the context of the available pollution control equipment which would provide the maximum possible reduction of pollution. The analysis must contain requests for bids and other inquiries made and responses received by you concerning the availability and performance of pollution control equipment, or other comparable evidence such as technical studies documenting efficacy of equipment to meet applicable requirements; and

(6) An examination of the regulatory options available to you in seeking to achieve environmental compliance. This examination must include an analysis of the availability of offsets, if needed, and the potential for securing variances and State Implementation Plan revisions, as appropriate. The analysis must illustrate and document your efforts, if any, to locate and identify available offsets, and to secure variances and SIP revisions. The analysis must contain any correspondence initiated or received by you concerning these regulatory options and all technical studies you have relied upon to support your conclusions.

In addition, you may submit any other documentation you believe

demonstrates an inability to comply with applicable environmental requirements despite good faith efforts.

(c) *Other actions.*

(1) Prior to deciding to submit an exemption application, it is recommended that you request a meeting with ERA and EPA or the appropriate state or local regulatory agency to discuss options for operating an alternate fuel-fired facility in compliance with the applicable environmental requirements; and

(2) You must submit a copy to ERA of your application for a construction permit at the same time you submit it to EPA or the state agency.

§505.25 Inability to obtain adequate capital.

(a) *Eligibility.* Section 212(a)(1)(D) of the Act provides for a permanent exemption due to inability to obtain adequate capital. To quality you must demonstrate to the satisfaction of ERA that despite good faith efforts, you will be unable to comply with the applicable prohibition imposed by the Act because you cannot raise the additional capital required for an alternate fuel-capable installation beyond that required for your proposed installation. If you are part of a firm, the analysis must be at the firm level.

(b) *Evidence required in support of the petition.* You must include at least the following evidence in order to make the demonstration required by this section:

(1) A description of your efforts to raise the additional capital, including a list of all financial institutions and individuals contacted as well as a summary of the results of each contact. If your inability to raise the additional capital is affected by specific restrictions, describe those restrictions and their effect.

(2) A detailed accounting of the additional capital required to construct and operate the alternate fuel-capable facility.

(3) An estimated accounting on a calendar-year basis of all cash outlays for capital investments and expenses for both your proposed unit and for an alternate fuel fired unit. All critical assumptions should be stated and sufficient data should be included to support your estimate.

(4) A detailed statement of the sources of funds you will raise to construct and operate your proposed installation.

(5) An analysis of the sources of funds available if the alternate fuel capable powerplant is constructed and operated.

(6) Your annual reports for the past 5 years.

(7) A 5-year summary of the financial records of the firm. If you are part of a consolidated corporation, the information must be at the consolidated corporation level. The 5-year summary shall include: [19]

(i) Balance sheets.

(ii) Income statements.

(iii) Fund flow statements.

(8) Standard financial indicators for the past 5 years which include: [20]

(i) Earnings per share of common and preferred stock.

(ii) Return on equity.

(iii) Current ratio and quick ratio.

(iv) Times-interest earned ratio.

(v) Price-earnings ratio for common stock.

(vi) Market-to-book ratio for common stock.

(vii) Latest Standard & Poor's or Moody's ratings on common stock, preferred stock, and bonds.

(9) A list of all investments made by your firm (or consolidated corporation) in excess of $1 million during the past 3 years. This list should specify the capital outlays by calendar year and the manner in which the outlay was financed.

(10) Any other relevant financial information that would reflect upon your ability to raise adequate capital to finance an alternate fuel-fired installation.

§ 505.26 State or local requirements.

(a) *Eligibility.* Section 212(b) of the Act provides for a permanent exemption due to state or local requirements which would preclude the construction and operation of an alternate fuel-fired installation. To qualify you must demonstrate to the satisfaction of ERA that:

(1) With respect to the proposed site of the installation, the operation or construction of the new installation using an alternate fuel is infeasible because of a state or local requirement other than a building code, nuisance or zoning law;

(2) You have in good faith attempted unsuccessfully to obtain a variance or waiver from the state or local requirement or can demonstrate why none is available;

(3) The granting of the exemption would be in the public interest and would be consistent with the purposes of the Act; and

(4) You are not entitled to a permanent exemption for lack of alternate fuel supply, site limitations, environmental requirements, or inability to obtain adequate capital for all alternate fuels.

(b) *Evidence required in support of a petition.* You must include at least the following evidence to make the demonstration required by this section:

(1) A copy of the pertinent state or local requirement with its citation and its legislative history;

(2) The identification and location of the administrative body which implements the requirement;

(3) A description of your attempts to obtain a waiver or variance from the requirements or a demonstration of why none is available;

(4) A description of any activities you were involved in after April 20, 1977, pertaining to the enactment of the requirement;

(5) A description of equipment, procedures, and the advance planning time necessary to comply with the requirement;

(6) A detailed description of why compliance with the state or local requirement is infeasible;

(7) The impact upon you and/or your local community, if any, should your petition be denied;

(8) An explanation of the reasons why granting this exemption would be in the public interest; and

(9) An analysis of why you cannot qualify for any of the exemptions listed in paragraph (a)(4) of this section for all alternate fuels.

(c) *Exercise of discretion by ERA.* ERA may refuse to grant this exemption to you if it determines that such grant would not be in the public interest or in accordance with the purposes of the Act, notwithstanding the fact that the evidence you have furnished to ERA in your exemption petition substantiates that your facility would otherwise be eligible to receive the exemption.

§ 505.27 Cogeneration.

(a) *Eligibility.* Section 212(c) of the Act provides for a permanent exemption for cogeneration. To qualify you must demonstrate to the satisfaction of ERA at least the following minimum criteria:

(1) The oil or gas to be consumed by the cogeneration facility will be less than that which would otherwise be consumed in the absence of the cogeneration facility where the calculation of savings is in accordance with paragraph (c) of this section;

(2) It would be in the public interest to grant an exemption to the cogeneration facility because of special circumstances such as technical innovation or maintaining industry in urban areas.

[19] If the information is contained in your annual reports, it need not be reported.

[20] If the information is contained in your annual reports, it need not be reported.

(b) *Specifications of the cogeneration facility.*

(1) A person proposing to construct a cogeneration facility may apply for an exemption under this section if the amount of net electricity that is either sold or exchanged is less than 50 percent. If the amount is 50 percent or more, see § 503.37 (Powerplants). Net electricity excludes sales or exchanges among owners of the cogeneration facility.

(2) Electricity generated by the proposed cogeneration facility must constitute more than 10 percent of the useful energy output of the facility and less than 90 percent of the useful energy output.

(c) *Calculation of oil and gas savings.* There is an oil and gas savings if the oil or gas to be consumed by the cogeneration facility will be less than that which would otherwise be consumed in the absence of the cogeneration facility. The calculation of the oil and gas which would otherwise be consumed must be in accordance with paragraphs (c) (1) and (2) of this section.

(1) Except for the case described in paragraph (c)(2) of this section, the oil or gas which would otherwise be consumed must be calculated as follows:

(i) You may include the oil or gas that would be consumed by facilities that are or would be too small to be covered by the FUA regulations. In the case of new small industrial units, you must demonstrate that it would be reasonable to construct units of that size.

(ii) You may include the oil or gas that would be consumed by units in place (existing or exempt) covered by FUA if they are less than 40 years old in the case of a field-erected unit or less than 20 years old in the case of a package unit. In the case of existing units, you may not include units that have burned an alternate fuel or are capable of burning an alternate fuel, and, you may only include units described by this paragraph if they will be retired or shut down if this exemption is granted.

(iii) You may include the oil or gas that would be consumed by units not yet constructed that would be covered by the FUA regulations if you can demonstrate that each unit would be entitled to an exemption.

(iv) You may include the oil or gas that would be consumed by powerplants to generate electricity supplied to the grid to the extent that such electricity, if you cogenerate, will no longer be supplied by the grid. The oil or gas portion must be based on a 10 year forecast that includes new construcion and retirement of plants within those 10 years.

(2) In the case of a cogeneration facility that would consist of an existing unit or an exempted unit and a new unit, you must calculate the amount of oil or gas that would otherwise be consumed as the sum of:

(i) The five-year annual average oil or gas consumption of the existing or exempted unit; and

(ii) The amount that would be consumed in units described in paragraphs (c)(1)(i)(iv) of this section that would now be satisfied by the new cogeneration facility.

(d) *Evidence required in support of a petition.* You must include at least the following evidence in order to make the demonstration required by this section:

(1) An engineering description of the cogeneration system, including proposed output and uses thereof, with sufficient detail to ensure that the facility qualifies as a cogeneration facility;

(2) A detailed oil and natural gas savings calculation identifying the projected oil or natural gas consumption of the cogeneration facility and the oil or natural gas that would otherwise be used;

(3) Identification of the FUA status of the proposed and displaced units with respect to coverage and designation as new, existing, or exempted, age of units, and alternate fuel capability of units;

(4) Identification of all persons and their roles in the proposed cogeneration facility;

(5) Where a demonstration is required that the units would be entitled to an exemption, submission of all evidence required by the regulations with respect to the applicable exemptions, including the alternate site showings; and

(6) In the case of paragraph (a)(2) of this section, an explanation of the public interest factors you believe should be considered by ERA.

(e) *Exercise of discretion by ERA.* ERA may refuse to grant this exemption to you if it determines that such grant would not be in the public interest or in accordance with the purposes of the Act, notwithstanding the fact that the evidence you have furnished to ERA in your exemption petition substantiates that your facility would otherwise be eligible to receive the exemption.

§ 505.28 Permanent exemption for certain fuel mixtures containing natural gas or petroleum.

(a) *Eligibility.* Section 212(d) of the Act provides for a permanent exemption for certain fuel mixtures. To qualify you must demonstrate to the satisfaction of ERA that:

(1) You propose to use a mixture of natural gas or petroleum and an alternate fuel as a primary energy source; and

(2) The amount of petroleum or natural gas you propose to use in the mixture will not exceed the minimum percentage of the total annual Btu heat input needed to maintain operational reliability of the installation consistent with maintaining a reasonable level of fuel efficiency.

(b) *Minimum percentage.* If the exemption is granted, ERA will not require that the percentage of petroleum or natural gas used in the mixture be less than 25 percent of the total annual Btu heat input of the installation.

(c) *Evidence required in support of a petition.* You must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section:

(1) A complete description of the fuel mixture, component elements of the mixture, and percentage of each component to be utilized;

(2) Your design specifications for the unit for which you are requesting an exemption; and

(3) An engineering assessment of the proportions of petroleum or natural gas needed to maintain operational reliability and adequate level of fuel efficiency; or

(4) If the unit will use a mixture containing less than 25 percent petroleum or natural gas, a certification that the amount of petroleum or natural gas you propose to use in the mixture will not exceed 25 percent of the total annual Btu heat input of the installation. The certification shall be executed by your duly authorized representative.

(d) *Reporting requirement.* If the exemption is granted, you must submit an annual report to ERA certifying that the affected units have used no more than the percentage of oil or natural gas specified in the exemption order. The certification shall be executed by your duly authorized representative.

(e) *Solar mixtures.* ERA will grant a permanent mixtures exemption for the use of a mixture of solar energy (including wind, tide, and other intermittent sources) and petroleum or natural gas, where—

(1) Solar energy will account for at least 20 percent of the annual Btu heat input of the unit; and

(2) You propose an acceptable plan to ERA which—

(i) Meets the evidence requirements set forth in paragraph (c) of this section; and

(ii) Contains a compliance plan prepared in accordance with § 505.9 of these regulations.

§ 505.29 Emergency purposes.

(a) *Eligibility.* Section 212(e) of the Act provides for a permanent exemption for emergency purposes. To qualify you must demonstrate to the satisfaction of ERA that you will operate and maintain the installation for emergency purposes only.

(b) *Definition.* For the purpose of this permanent exemption, an emergency exists when operation of an oil or gas-fired installation is necessary for: (1) plant protection; (2) the preservation of human health; or (3) continued facility production which otherwise would be reduced due to an interruption of alternate fuel supplies, equipment failures, or temporary environmental restrictions.

(c) *Evidence required in support of a petition.* To submit an adequate petition for review by ERA, you must include in your petition at least the following evidence:

(1) Certification executed by a duly authorized officer of the company stating that operation under the provisions of this exemption will occur only in accordance with the definition of emergency;

(2) A description of the other units at the site including for each the capacity, type of fuel consumed, average utilization rate, designation as "new" or "existing" under this program, and exemption, if any;

(3) A description of the types of emergency situations you believe may arise which cause you to request this exemption;

(4) All data required by § 505.7 (use of mixtures—general requirement) of these regulations demonstrating that use of a mixture(s) is not economically or technically feasible; and

(5) All data required by § 505.8 (use of fluidized bed combustion not feasible—general requirement) if ERA has made a generic or site-specific finding that the use of a method of fluidized bed combustion of an alternate fuel is economically and technically feasible.

(d) *Additional information.* You must submit the following additional information:

(1) All data required by § 502.11 (Petroleum and natural gas use) of these regulations;

(2) All data required by § 502.12 (Conservation measures) of these regulations which described any oil or natural gas conservation measures you have taken or intend to take if the exemption is granted; and

(3) All data required by § 502.13 (Environmental impacts analysis) of these regulations which will assist ERA to fulfill its responsibilities under the National Environmental Policy Act (NEPA).

(e) *Reporting requirement.* At the end of each 12-month period from the effective date of the exemption, you must report to ERA the amount of fuel used under this exemption by month. You must also describe the emergency conditions that required the operation of the unit.

§ 505.30 [Reserved]

§ 505.31 Scheduled equipment outages.

(a) *Eligibility.* Section 212(j) of the Act provides for a permanent exemption to meet scheduled equipment outages. To qualify you must demonstrate to the satisfaction of ERA that:

(1) Your routine maintenance schedule does not permit, or could not be adjusted to permit, continuing production or other activity carried on at the site unless ERA grants this exemption and the reasons why;

(2) If your scheduled outages and thereby your projected use of the proposed unit exceed 21 days per year, you cannot meet your requirements by burning an alternate fuel; and

(3) The pertinent unit will be used only during those periods when other units are not in operation for reason of scheduled outage.

(b) *Evidence required in support of a petition.* To submit an adequate petition for review by ERA, you must include in your Fuels Decision Report at least the following evidence in order to make the demonstration required by this section.

(1) An explanation of why your routine maintenance schedule does not permit, or could not be adjusted to permit, continuing production or other activity carried on at the site unless ERA grants this exemption;

(2) A schedule of operation for the pertinent unit estimating the number of hours per year used and fuel consumed during the first 12 months of operation after commencement of operation;

(3) A description of the maintenance schedule for all units located at the facility specifically identifying those units at the facility which will be out of service for scheduled maintenance at times when the unit for which the exemption is required, is operating; and

(4) If your scheduled outages and thereby your projected use of the proposed unit exceed 21 days per year, documentary evidence which demonstrates that you considered the use of alternate fuels, including a description of the fuel alternatives you examined and the factors important in your decision to reject the use of alternate fuels. Such factors would include lack of alternate fuel supply, site limitations, environmental requirements, inability to raise adequate capital, or certain state or local requirements.

(c) *Reporting requirement.* ERA will rely upon the schedule of operation of the unit submitted with the petition as the permanent schedule for exempt use. You must notify ERA in advance of any changes to this schedule.

(d) *Exercise of discretion by ERA.* ERA may refuse to grant this exemption to you if it determines that such grant would not be in the public interest or in accordance with the purposes of the Act, notwithstanding the fact that the evidence you have furnished to ERA in your exemption petition substantiates that your facility would otherwise be eligible to receive the exemption.

(e) *Emergency use.* You may apply for an emergency exemption in addition to this exemption for the same unit. You must meet the eligibility and evidence requirements of each exemption to obtain them. You must also comply with the reporting requirements of each.

PART 506—EXISTING MAJOR FUEL BURNING INSTALLATIONS [RESERVED]

PART 507—FUEL CLASSIFICATION AND REPORTING REQUIREMENTS

Sec.

507.1 Purpose and scope.
507.2 Definition of fuels.
507.3 Exclusions from the definition of natural gas.
507.4 Exclusions from the definition of petroleum.
507.5 Reporting requirements of powerplants using natural gas from small wells.
507.6 Reporting requirements on use of commercially unmarketable natural gas.
507.7 Reporting requirements on use of commercially unmarketable by-products of refinery operations.

Authority: (Department of Energy Organization Act, Pub. L. 95–91, 91 Stat. 565 (42 U.S.C. 7101 et seq); Powerplant and Industrial Fuel Use Act of 1978, Pub. L. 95–620, 92 Stat. 3289 (42 U.S.C. 8301 et seq); E.O. 12009, 42 FR 4267).

PART 507—FUEL CLASSIFICATION AND REPORTING REQUIREMENTS

§ 507.1 Purpose and scope.

(a) *Purpose.* This subpart excludes certain solid, gaseous and liquid fuels from the terms "natural gas" and "petroleum" for the purpose of the Act

and requires reporting by certain users of such excluded fuels.

(b) *Scope.* This subpart applies to use of such excluded fuels in all new and existing electric powerplants and major fuel burning installations.

§ 507.2 Definition of fuels.

(a) Natural gas means any fuel consisting in whole or in part of natural gas, including components of natural gas such as methane and ethane; liquid petroleum gas; synthetic gas derived from petroleum or natural gas liquids; or any mixture of natural gas and synthetic gas, except as designated in § 507.3(f) of this part. Natural gas does not include any of the fuels excluded by § 507.3.

(b) Petroleum means crude oil and products derived from crude oil. Petroleum does not include any of the fuels excluded by § 507.4.

§ 507.3 Exclusions from the definition of natural gas.

(a) Natural gas does not include gas specifically designated as an alternate fuel in these regulations (§ 500.2(a)).

(b) Natural gas does not include that which is commercially unmarketable, by reason of quality, quantity or distance from existing transportation networks. (Additional Definition Reserved.)

(c) Natural gas does not include that produced by the user from a well, the maximum efficient production rate of which is less than 250 million Btu's per day.

For purposes of this subparagraph—

(1) "produced by the user" means:

(i) All gas produced by the well, where such gas is delivered for use in the user's facility through a gas delivery, gathering or transportation system which could not deliver such gas to any other market, or

(ii) Only that amount which represents the user's net working (mineral) interest in the gas produced from such wells, where such gas is delivered for use in the user's facility through a gas delivery, gathering or transportation system which could deliver such gas to another market.

(2) "Maximum efficient production rate" (MEPR) means that rate at which production of natural gas and oil may be sustained without damage to the reservoir or the rate which may be sustained without damage to the ultimate recovery of oil or gas through the well. The MEPR must include the Btu value of any crude oil, gas condensate, and natural gas liquids which may be produced from the well, in addition to that of the natural gas.

(d) Natural gas does not include occluded methane in coal seams, within the meaning of Section 107(c)(3) of the NGPA;

(e) Natural gas does not include, from wells spudded prior to January 1, 1990:

(1) Gas produced from geopressured brine, within the meaning of Section 107(c)(2) of the NGPA;

(2) Gas produced from Devonian shale, within the meaning of Section 107(c)(4) of the NGPA; and

(3) Other gases designated by FERC as "high-cost natural gas" in accordance with Section 107(c)(5) of the Natural Gas Policy Act, except as specifically designated as "natural gas" by ERA.

(f) Natural gas does not include synthetic gas derived from an alternate fuel which is not mixed with natural gas;

(g) Natural gas does not include mixtures of natural gas and synthetic gas derived from alternate fuels for which the person proposing to use the gas certifies to ERA that:

(1) He owns, or is entitled to receive at the point of manufacture, synthetic gas derived from alternate fuels;

(2) He delivers, or arranges for the delivery of, such synthetic gas to a pipeline or pipelines which by transport or displacement are capable of delivering such synthetic gas, mixed with natural gas, to facilities owned by the user; and

(3) The total annual Btu value of the synthetic gas delivered to such a pipeline or pipelines is equal to or greater than the total annual Btu value of the natural gas delivered to the facilities owned by the user, plus the approximate annual total Btu value of any natural gas consumed or lost in transportation.

(4) All necessary permits, licenses, or approvals from appropriate Federal, state, and local agencies (including Indian tribes) have been obtained for construction and operation of the facilities for the manufacture of the synthetic gas involved, except that for purposes of the prohibition under Section 201(2) of the Act against powerplants being constructed without the capability of using coal or another alternate fuel, only permits, licenses, and approvals for the construction of such synthetic gas facilities shall be required under this subparagraph to be certified and documented.

§ 507.4 Exclusions from the definition of petroleum.

Petroleum does not include:

(a) Petroleum products specifically designated as alternate fuels in these regulations (§ 500.2(a));

(b) Synthetic gas derived from crude oil;

(c) Liquid petroleum gas;

(d) Petroleum coke or waste gases from nonrefinery industrial operations; and

(e) A liquid, solid, or gaseous waste by-product of refinery operations, including components (such as butane and propane) which can be extracted from the waste by-product through reasonable further processing of the waste by-product at the refinery and including final products which use the waste by-product as a blend stock at the refinery, which is commercially unmarketable by reason of—

(1) Quality, where—

(i) the by-product could not reasonably be expected to be used in non-refinery operations; or

(ii) The by-product is not a recognized item of commerce in a national market or in the regional or local area in which the facility is located; or

(iii) the cost of processing (limited to upgrading the product to commercial quality), storing, and distributing the by-product would not be covered by reasonably expected revenues from its sale; or

(2) Quantity, where—

(i) the quantities of the by-product are so insufficient or sporadic as not to constitute an adequate and reliable supply to a potential buyer other than the producer; or

(ii) The by-product is produced in quantities significantly less than those quantities normally sold in the appropriate market; or

(iii) the cost of aggregating the product into commercial quantities through storage and distributing the by-product would not be covered by reasonably expected revenues from its sale.

§ 507.5 Reporting requirements of powerplants using natural gas from small wells.

If you own or operate a powerplant which uses or intends to use more than 4.0 billion Btu's per day of natural gas produced from wells with a maximum efficient production rate of less than 250 million Btu's per day (§ 507.3(c)), you must report to ERA by January 31, 1980, and annually thereafter:

(a) Facilities using such gas;

(b) Yearly quantities and the Btu value of such gas used in each such facility;

(c) The number, location and average daily production of all such wells which were acquired

(1) prior to November 9, 1978, and

(2) on or after November 9, 1978.

§ 507.6 Reporting requirements on use of commercially unmarketable natural gas.

If you use or intend to use natural gas which you consider to be commercially unmarketable § 507.3(b)), you must file a report to ERA by January 31, 1980, and annually thereafter,

(a) The facilities which are burning such gas;

(b) Yearly quantities and the Btu value of such gas used in each such facility;

(c) The number and location of each well producing such gas burned in each such facility;

(d) The quantity of gas produced from each such well over the past 12 months and the MEPR of each such well;

(e) A projection of the total quantity of such gas you intend to use from such wells over the next 12 months; and

(f) An explanation of why you consider this gas to be commercially unmarketable. (Additional Reporting Requirements Reserved.)

§ 507.7 Reporting requirements on use of commercially unmarketable by-products of refinery operations.

If you use or intend to use solid, gaseous or liquid by-products of refinery operations which you consider to be commercially unmarketable (§ 507.4), you must file a report with ERA by January 30, 1980, and annually thereafter including the following:

(a) The facilities which are burning such by-products;

(b) A description of the solid, gaseous or liquid by-products including the components of those by-products which could physically be extracted, notwithstanding the fact that you may not own the equipment necessary to perform this extraction; and, the end product(s) into which the by-products could be blended, notwithstanding the fact that you may not own such end product(s).

(c) Average monthly production levels of these by-products and their components;

(d) An analysis of why you believe such waste by-products to be commercially unmarketable, by reason of quality or quantity; and

(e) Such other information as ERA may request.

[FR Doc. 79-15463 Filed 5-16-79; 8:45 am]

BILLING CODE 6450-01-M

10 CFR Parts 503 and 505

[Docket No. ERA-R-78-19E]

Alternate Fuels; Amendment to Preamble to Interim Rule

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Amendment to Preamble to Interim Rule.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy is issuing this amendment to the preamble of the Interim Rules to implement provisions of the Powerplant and Industrial Fuel Use Act of 1978 (FUA). This amendment replaces a discussion of and requests comments on specific issues associated with an economic test employed in these regulations.

DATES: These interim rules became effective on an interim basis on May 8, 1979. Written comments will be accepted until August 15, 1979, and will be considered by ERA before issuing these rules in final form. No additional public hearings will be held.

ADDRESSES: All comments should be addressed to Public Hearing Management, Docket No. ERA-R-78-19E, Department of Energy, Room 2312, 2000 M Street, N.W., Washington, D.C. 20461.

FOR FURTHER INFORMATION CONTACT:

WILLIAM L. WEBB (Office of Public Information), Economic Regulatory Administration, Department of Energy, 2000 M Street, N.W., Room B-110, Washington, D.C. 20461, (202) 634-2170.

Stephen M. Stern (Regulations and Emergency Planning), Economic Regulatory Administration, Department of Energy, Room 2130C, 2000 M Street, N.W., Washington, D.C. 20461, (202) 254-3987.

Robert L. Davies (Fuels Regulations—Program Office) Economic Regulatory Administration, Department of Energy, Room 6128I, 2000 M Street, N.W., Washington, D.C. 20461 (202) 254-3910.

James Heffernan (Office of General Counsel), Department of Energy, Room 7136, 12th and Pennsylvania Avenue, N.W., Washington, D.C. 20461 (202) 633-8714.

Background

For purposes of the "substantially exceeds" index in the interim rule implementing the Powerplant and Industrial Fuel Use Act, we assumed that the benefit of displacing natural gas could be measured in part by its effect in displacing imported oil, and that the ratio of such displacement was 1:1. In the preamble to the interim final rule as originally drafted, we discussed the legal and policy issues bearing upon that valuation in terms that may have led to the impression that we had reached a final conclusion on those issues, so that commenters no longer would effectively have opportunity to be heard regarding them. However, the preamble should not be read as expressing the agency's view that ERA's policy options under FUA are necessarily limited to a 1:1 gas to imported oil displacement ratio; rather the issues should be addressed thoroughly during the further comment period. Accordingly, we are amending the preamble to the interim rule in order to highlight these issues and to insure that they receive the most thorough consideration prior to our decision on a final rule.

In consideration of the foregoing, the following paragraphs replace in their entirety the paragraphs regarding the "substantially exceeds" index under the subheading "Gas/Oil Displacement Ratio," in the preamble to the interim rule.

Issued in Washington, D.C., May 13, 1979.

David J. Bardin,

Administrator, Economic Regulatory Administration.

Gas/Oil Displacement Ratio

Both RARG's analysis and the analysis in this preamble measure the benefit of FUA's displacement of natural gas by looking to the effects of such gas displacement on oil imports. The RARG analysis assumed that displacing a combination of natural gas and oil through implementation of FUA would result in a .69 to 1 displacement of imported oil. That is, RARG estimated that displacing 100 BTU's of natural gas under the Act reduces oil imports by only 69 BTU's.

The actual displacement ratio is extremely difficult to estimate with confidence. From a purely analytic perspective, the oil import displacement ratio for natural gas is probably less than 1 to 1. There are, however, questions of law and policy under FUA that bear upon the value assigned to natural gas displacement in arriving at the "substantially exceeds" index.

A displacement ratio substantially lower than 1 to 1 is dependent on ample gas supplies over the 30 to 40 year planning period for this program. Where supplies are ample, gas saved by the FUA program will remain in the ground rather than displace imported oil. We believe, however, that it may be

inappropriate to assume such gas supplies when making policy judgments under FUA, an Act premised on a need to preserve natural gas because supplies are not ample. Moreover, to assume a displacement ration of less than 1:1, without then assigning a benefit to natural gas displacement on some basis other than by virtue of its displacement of imported oil, would raise questions of law and policy under the Act.

In light of these issues, we are for purposes of this interim rule assuming a natural gas to imported oil displacement ratio of 1:1. We particularly invite comment on what is a reasonable displacement ratio; on what factors should be considered in estimating such a ratio; on whether the benefits of natural gas displacement can be quantified on some basis other than displacement of imported oil; and on whether it is appropriate under FUA to arrive at a substantially exceeds index through a method that in effect values gas displacement differently from oil displacement.

[FR Doc. 79-15638 Filed 5-16-79; 9:39 am]
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AGENCY PUBLICATION ON ASSIGNED DAYS OF THE WEEK

The following agencies have agreed to publish all documents on two assigned days of the week (Monday/Thursday or Tuesday/Friday). This is a voluntary program. (See OFR NOTICE FR 32914, August 6, 1976.)

Monday	Tuesday	Wednesday	Thursday	Friday
DOT/COAST GUARD	USDA/ASCS		DOT/COAST GUARD	USDA/ASCS
DOT/NHTSA	USDA/APHIS		DOT/NHTSA	USDA/APHIS
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DOT/OHMO	USDA/FSQS		DOT/OHMO	USDA/FSQS
DOT/OPSO	USDA/REA		DOT/OPSO	USDA/REA
CSA	MSPB*/OPM*		CSA	MSPB*/OPM*
	LABOR			LABOR
	HEW/FDA			HEW/FDA

Documents normally scheduled for publication on a day that will be a Federal holiday will be published the next work day following the holiday.

Comments on this program are still invited. Comments should be submitted to the Day-of-the-Week Program Coordinator, Office of the Federal Register, National Archives and Records Service, General Services Administration, Washington, D.C. 20408

***NOTE: As of January 1, 1979, the Merit Systems Protection Board (MSPB) and the Office of Personnel Management (OPM) will publish on the Tuesday/Friday schedule. (MSPB and OPM are successor agencies to the Civil Service Commission.)**

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance. Since this list is intended as a reminder, it does not include effective dates that occur within 14 days of publication.

Rules Going Into Effect Today

AGRICULTURE DEPARTMENT

Animal and Plant Health Inspection Service—

25172 4-27-79 / House protection

INTERIOR DEPARTMENT

Fish and Wildlife Service—

23062 4-17-79 / Listing of the Bolson Tortoise as an endangered species; final rule

JUSTICE DEPARTMENT

Immigration and Naturalization—

22704 4-17-79 / Seizure and forfeiture of vehicles vessels and aircraft

TREASURY DEPARTMENT

Comptroller of the Currency–

22712 4-17-79 / Loans to foreign governments, their agencies, and instrumentalities utilities; interpretive ruling

List of Public Laws

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's List of Public Laws.

Last Listing May 14, 1979

Advance Orders are now Being Accepted for Delivery in About 6 Weeks

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(Revised as of January 1, 1979)

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[A Cumulative checklist of CFR issuances for 1978 appears in the first issue of the Federal Register each month under Title 1. In addition, a checklist of current CFR volumes, comprising a complete CFR set, appears each month in the LSA (List of CFR Sections Affected)]

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